

# Rediscovering the Republican Origins of the Legal Ethics Codes

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## I. INTRODUCTION

The consensus among leading commentators on legal ethics issues is that the legal ethics codes<sup>1</sup> embody an adversarial ethic.<sup>2</sup> An examination of the historical roots of the legal ethics codes in the work of George Sharswood, a nineteenth century jurist and scholar provides an alternative interpretation.<sup>3</sup> Although largely ignored by commentators today, Sharswood's essay on ethics was the original source of most of the modern legal ethics codes.<sup>4</sup> Sharswood believed that a lawyer's principal obligation was the republican pursuit of the community's common good even where it conflicts with either her client's or her own interests.<sup>5</sup> Sharswood defined the common good as the protection of order, liberty, and property in order to provide individuals with the opportunity to perfect themselves.<sup>6</sup>

Although Sharswood's essay does not govern interpretation of the modern codes, it has had significant influence on their content and language. The drafters of the first national code, the American Bar Association (ABA) *Canons of Ethics*,<sup>7</sup> expressly acknowledged that they were borrow-

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1. The term codes refers collectively to the ABA's *Canons of Ethics*, *Model Code of Professional Responsibility*, and *Model Rules of Professional Conduct*.

2. See discussion *infra* Part V.A.

3. George Sharswood, *An Essay on Professional Ethics*, 32 A.B.A. REP. 1 (5th ed. 1907). The drafters of the 1908 ABA CANONS OF ETHICS [hereinafter CANONS] relied upon this edition of Sharswood's essay. 33 A.B.A. REP. 568 (1908). The essay was first published as A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF LAW, DELIVERED BEFORE THE LAW CLASS OF THE UNIVERSITY OF PENNSYLVANIA (1854).

4. See discussion *infra* Part V.A.

5. See discussion *infra* Part III.

6. See discussion *infra* Part III.

7. CANONS OF ETHICS, 33 A.B.A. REP. 575 (1908) [hereinafter CANONS]. Although officially termed the *Canons of Ethics*, they were popularly referred to as the *Canons of Professional Ethics*. See, e.g., HENRY S. DRINKER, LEGAL ETHICS 309 (1953) (referring to the *Canons* as the *Canons of Professional Ethics*).

ing language and ideas from Sharswood's treatise.<sup>8</sup> The ABA's subsequent codification of the *Model Code of Professional Responsibility* in 1970<sup>9</sup> and the *Model Rules of Professional Conduct* in 1983<sup>10</sup> have retained much of the subject matter the *Canons* adopted from Sharswood, departing from the *Canons* only in the mechanisms for enforcing ethical standards.<sup>11</sup> Therefore, the *Model Code* and the *Model Rules*, like the *Canons* before them, preserve lawyers' opportunities to act primarily as public officers with broad discretion and authority to substitute their moral judgments for those of their clients.<sup>12</sup> The profession's purported adherence to the adversarial ethic demonstrates that modern commentators have not fully appreciated the implications of these concepts retained from Sharswood's treatise.

While this article examines the significant impact that Sharswood's treatise had upon the drafting of the codes, it does not propose a normative valuation of the existing ethical standards or of Sharswood's republican vision. However, this examination of Sharswood's influence will contribute to the ongoing debate regarding the proper role of lawyers. Sharswood's work provides powerful historical precedent for those who oppose the adversarial role of attorneys. At the same time it also raises serious questions about whether this approach offers a feasible alternative to the adversarial ethic. For defenders of the adversarial role, this republican reading of the ethics codes suggests that it would require major revisions of the *Model Code* and the *Model Rules* in order to obtain compliance with the adversarial model.

Part II of this article contrasts Sharswood's central role in the development of the legal ethics codes with the limited role which modern commentators assign him. Next, Part III describes Sharswood's republican vision of legal ethics. Sharswood's guidelines for ethical lawyer conduct are outlined in Part IV, and Sharswood's vision is traced through the *Canons* into the *Model Code* and the *Model Rules*. Finally, Part V.A suggests reasons why modern commentators have neglected Sharswood and therefore misread the legal ethics codes, and the remainder of Part V discusses the implications of reading the codes in light of their historical context on the current debate regarding lawyers' ethical and professional responsibilities.

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8. See *infra* Part II.A.

9. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1983) [hereinafter MODEL CODE].

10. MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter MODEL RULES].

11. See discussion *infra* Parts II.A., IV.C.

12. See discussion *infra* Parts IV, V.A.

## II. THE CONTRAST BETWEEN SHARSWOOD'S CENTRAL ROLE IN THE DEVELOPMENT OF THE LEGAL ETHICS CODES AND HIS MINOR ROLE IN MODERN COMMENTARY

The importance of Sharswood's nineteenth century essay to understanding our current legal ethics codes will be discussed in this section. First, this section outlines how the language of Sharswood's essay found its way into the *Canons* and thereby the *Model Code* and the *Model Rules*. Next, it contrasts the pivotal role of Sharswood's essay with current commentators' inattention to Sharswood's influence. It suggests, as Part V.A. discusses further, that the lack of attention to Sharswood's work has resulted in an incomplete understanding of the legal ethics codes.

### A. THE CENTRAL ROLE OF SHARSWOOD'S ESSAY IN THE DEVELOPMENT OF THE LEGAL ETHICS CODES

When the ABA adopted the first national legal ethics code in 1908, Sharswood's text was well-known and its formative contribution acknowledged. The *Canons* setting forth the lawyer's major duties to the courts, the bar, and the client, and all but seven of the original thirty-two *Canons*, are drawn in whole or in part from Sharswood. The current ethical guidelines, the *Model Code* and the *Model Rules*, have retained the substantive content of the *Canons* and have changed only the mechanisms for enforcement of the ethical standards.

Sharswood's essay was studied by those ABA members who drafted the *Canons*. At the request of the committee charged with drafting the new ethical code, the ABA reprinted and mailed to all members a 214 page edition of Sharswood's essay.<sup>13</sup> When the *Canons* were subsequently adopted, they bore the imprint of Sharswood's essay. The original printing of the *Canons* in the ABA Reports, pursuant to the direction of the *Canons'* drafters, began with Sharswood's exhortation that "[h]igh moral principle is the [lawyer's] only safe guide, the only torch to light his way amidst darkness and obstruction."<sup>14</sup>

The language of the *Canons* drew heavily on the 1887 Alabama State Bar Code of Ethics,<sup>15</sup> which largely represented a codification of the princi-

13. 31 A.B.A. REP. 63-64 (1907). Sharswood's essay was printed as 32 A.B.A. REP. 1 (1907). Other materials provided to the ABA by the Committee on the Code of Professional Ethics included compilations of 12 state's ethics codes (which were largely based on Sharswood's essay), David Hoffman's *Resolutions in Regard to Professional Deportment*, and Dr. Samuel Johnson's *The Lawyer's Prayer*. 31 A.B.A. REP. 679 (1907).

14. 33 A.B.A. REP. 574, 571 (1908).

15. *Id.* at 569-70. Judge Thomas Goode Jones, the drafter of the Alabama Code, was a member of the ABA drafting committee and played a major role in drafting the *Canons*. *Id.*

ples contained in Sharswood's essay.<sup>16</sup> The drafting committee quoted with approval the statement of an earlier commentator of the day who observed that:

[a]nyone who is familiar with the little book by Judge Sharswood on 'Legal Ethics' will readily see how large a part of [the Alabama] code has been drawn from that source. Many of its maxims have been transferred word for word from Sharswood's treatise, and this is certainly its best recommendation.<sup>17</sup>

The following year when the drafting committee introduced the *Canons* on the floor of the ABA, the presenter noted that the *Canons* were "based upon Sharswood's Legal Ethics."<sup>18</sup>

A textual comparison of the *Canons* with Sharswood's essay underscores this acknowledgement. One example of the drafters' use of Sharswood's language is the well-known phrase found in the only passage of the *Canons* punctuated with quotation marks: "[t]he lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability . . .'"<sup>19</sup> The *Canons* do not provide attribution for the quotation, but it is taken from Sharswood's essay.<sup>20</sup> The use of Sharswood's unattributed quotation for this central proposition indicates not only reliance on Sharswood but also broad familiarity with his work among the readers of the *Canons*.

The other ideas and language borrowed from Sharswood that appear in the *Canons* are generally paraphrased. For example, Canon 6, which bars conflicts of interest, incorporates many of Sharswood's phrases without quotation marks.<sup>21</sup> Other *Canons* which do not use Sharswood's exact

16. See 31 A.B.A. REP. 676, 678. Judge Jones kept a copy of Sharswood's essay on his desk and consulted it when drafting the Alabama Code. Walter B. Jones, *Canons of Professional Ethics, Their Genesis and History*, 7 NOTRE DAME L. REV. 483, 484 (1932).

17. 31 A.B.A. REP. 678 (1907) (quoting KY. B.A. REP. 25 (1903)).

18. 33 A.B.A. REP. 56 (1908).

19. CANONS, *supra* note 7, at Canon 15.

20. Sharswood, *supra* note 3, at 78-79.

21. CANONS, *supra* note 7, at Canon 6, which begins with the admonition that:

[i]t is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

The language of Canon 6 repeats words and concepts from a passage from Sharswood's essay which states that:

the advocate is bound in honor, as well as duty, to disclose to the client at the time of the retainer, every circumstance of his own connection with the parties or prior relation to the controversy, which can or may influence his determination in the selection of him for the office.

Sharswood, *supra* note 3, at 109-10. The above language of Canon 6 incorporates Sharswood's rule

words nevertheless adopt his prescriptions. For example, Canon 3, which prohibits *ex parte* conversations with judges, summarizes in one sentence a paragraph from Sharswood.<sup>22</sup>

Some of the *Canons* follow the spirit of Sharswood's essay but adopt less rigorous edicts. For example, Sharswood teaches that court-appointed counsel for criminal defendants "cannot decline the office."<sup>23</sup> Canon 4, however, permits a lawyer to decline appointment but instructs that "[a] lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason . . ."<sup>24</sup>

As discussed in Part IV *infra*, the seven of the thirty-two original *Canons* not drawn from Sharswood are nonetheless consistent with his vision.<sup>25</sup> These seven *Canons* deal with merit selection of judges,<sup>26</sup> differences

requiring disclosure of conflicts to the client "at the time of the retainer." The words "duty," "time of retainer," and "controversy" remain. The changes in language appear to reflect minor editing. For example, the drafters changed Sharswood's "selection of him for the office" to read "selection of counsel," and modified Sharswood's "every circumstance of his own connection with the parties" to read "all the circumstances of his relations to the parties."

22. CANONS, *supra* note 7, at Canon 3, which instructs that "[a] lawyer should not communicate or argue privately with the Judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a Judge special personal consideration or favor." This sentence summarizes and omits explanatory language from the following passage:

[a]nother plain duty of counsel is to present everything in the cause to the court openly in the course of the public discharge of its duties. It is not often, indeed, that gentlemen of the Bar so far forget themselves as to attempt to exert privately an influence upon the judge, to seek private interviews, or take occasional opportunities of accidental, or social meetings to make *ex parte* statements, or to endeavor to impress their views. They know that such conduct is wrong in itself and has a tendency to impair confidence in the administration of justice, which ought not only to be pure but unsuspected.

Sharswood, *supra* note 3, at 66.

23. Sharswood, *supra* note 3, at 91.

24. CANONS, *supra* note 7, at Canon 4. Similar examples are the *Canons* relating to suing clients and contingency fees. Sharswood acknowledges that the law permits suing clients to recover fees but suggests that the better practice is not to do so. Sharswood, *supra* note 3, at 151-52. Canon 14 incorporates the spirit of Sharswood's approach by disfavoring the practice of suing clients to recover fees while permitting it. Canon 14 provides that "[c]ontroversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his services; and lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud." CANONS, *supra* note 7, at Canon 14.

In a related manner, Sharswood states that contingent fees are unethical but recognizes that they are legal. Sharswood, *supra* note 3, at 153-64. Canon 13 did not prohibit contingency fees, but it did require that, "where sanctioned by law, [contingent fee agreements] should be under the supervision of the Court, in order that clients may be protected from unjust charges." CANONS, *supra* note 7, at Canon 13. The question of contingency fees provided the only significant debate at the ABA meeting which adopted the *Canons*. 33 A.B.A. REP. 61-85 (1908). Indeed, the ABA modified the committee draft to add the phrase "in order that clients may be protected from unjust charges." *Id.* at 579.

25. The ABA originally adopted 32 Canons. ABA revisions in 1928, 1933, and 1937, together added a total of 15 Canons for a total of forty-seven. DRINKER, *supra* note 7, at 309 n.1. This section and *infra* Part III focus on the original 32 Canons without particular analysis of the 15 later Canons. Each of them, however, is either related to, or consistent with, Sharswood's ethical teaching. The new Canons

of opinion with professional colleagues,<sup>27</sup> communication with adverse parties,<sup>28</sup> lawyer testimony,<sup>29</sup> newspaper publicity,<sup>30</sup> advertising,<sup>31</sup> and exposing lawyer misconduct.<sup>32</sup>

Although the ABA replaced the *Canons* with the *Model Code* in 1970 and the *Model Rules* in 1983,<sup>33</sup> Professor Geoffrey C. Hazard, Jr. has stated that "the content of the legal profession's narrative and core ethical rules, as pronounced in the 1908 *Canons*, has been preserved largely unchanged in today's *Model Rules*."<sup>34</sup> The *Model Rules* "enforce three core values: loyalty, confidentiality and candor to the court."<sup>35</sup>

Professor Hazard, the Reporter to the Commission that drafted the *Model Rules*, notes that what has changed from the *Canons* to the *Model Code* and *Model Rules* is the mechanism for enforcement of ethical standards. The *Canons* represented "fraternal norms issuing from an autonomous professional society [that] have now been transformed into a body of judicially enforced regulations."<sup>36</sup> The *Model Code* moves to a mix between ethical aspirations and disciplinary rules while the *Model Rules* re-

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elaborate on: restrictions on recruiting clients (Canons 33, 35, 44 and 46); compensation arrangements (Canons 34, 38 and 42; and newspaper publicity (Canon 40). The new Canons also added provisions regarding: client confidences (Canon 37); witness interviews (Canon 39); client fraud (Canon 41); withdrawal (Canon 44); unauthorized practice of law (Canon 47); application of the Canons to specialists (45); and retirement from a position as judge or public employee (Canon 36). DRINKER, *supra* note 7, at app. C.

26. CANONS, *supra* note 7, at Canon 2.

27. *Id.* at Canon 7.

28. *Id.* at Canon 9.

29. *Id.* at Canon 19.

30. *Id.* at Canon 20.

31. *Id.* at Canon 27.

32. *Id.* at Canon 29.

33. Of the 50 states and the District of Columbia, 35 followed the lead of the ABA and adopted the *Model Rules*. Fourteen jurisdictions continue to use the *Model Code*, one has adopted a structural and substantive amalgam of the *Model Code* and the *Model Rules*, and one has its own unique ethics code. 5 Laws. Man. on Prof. Conduct (ABA/BNA) 1:3-1:4 (July 15, 1992).

34. Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1249 (1991). Most commentators agree with Professor Hazard. See, e.g., Forest J. Bowman, *The Proposed Model Rules of Professional Conduct: What Hath the ABA Wrought?* 13 PAC. L.J. 273, 286 (1982) ("In matters of basic ethics, however, the changes in the new Code were mostly variations of emphasis and scope" and involved only four areas: fee splitting, use of the title "doctor," leaving a legislator's name on the firm name, and neglect of a legal matter). Even those who suggest a break between the *Canons* and the *Model Code* do not suggest a basic change in content and vision. Rather, they point to differences in procedures and the inclusion of the lawyer's role as negotiator and counselor. See, e.g., MONROE FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 4 (1990) (stating that the ABA repudiated the *Canons* because they "failed to give adequate guidance, lacked coherence, omitted reference to important areas of practice, and did not lend themselves to meaningful disciplinary enforcement"). Professor Hazard agrees that the *Model Code* and *Model Rules* represent a similar change in emphasis, especially with regard to enforcement. Hazard, *supra*, at 1249-51.

35. Hazard, *supra*, at 1246.

36. *Id.* at 1249.

present a formal, "enforceable legal code."<sup>37</sup>

Accordingly, while the enforcement mechanisms of today's legal ethics codes have departed from Sharswood's text, they continue to rely in large part on the substance of Sharswood's essay. The significance of this reliance for interpretation of the *Model Code* and the *Model Rules* will be discussed in Part IV.

## B. SHARSWOOD'S MINOR ROLE IN MODERN LEGAL ETHICS COMMENTARY

Despite Sharswood's significant contribution to the development of the modern legal ethics codes, commentators have failed to appreciate the importance of Sharswood's essay when interpreting the *Model Code* and the *Model Rules*. Most modern commentators acknowledge that Sharswood's essay was the source of the *Canons*.<sup>38</sup> However, they generally treat Sharswood's contribution in a cursory manner.<sup>39</sup> Those commentators who have acknowledged Sharswood's theoretical perspective have often mistakenly overstated either his commitment to the adversarial ethic<sup>40</sup> or his opposition to it.<sup>41</sup>

37. *Id.* at 1250-51.

38. See, e.g., JEROLD AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 41 (1976); GEOFFREY C. HAZARD, JR. and DEBORAH L. RHODE, *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* 93 (1988); DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* xvii-xviii (1988); THOMAS MORGAN and RONALD ROTUNDA, *PROFESSIONAL RESPONSIBILITY* 11 (5th ed. 1991); Bowman, *supra* note 34, at 282 (explaining that "Thomas Goode Jones' creation, itself Judge Sharswood's essay in many respects, became the ethical guide of the American legal profession").

39. For example, in his treatise on legal ethics, Professor Charles Wolfram only mentions Sharswood twice. CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 10.3.1 (1986). Wolfram notes that the *Canons'* unattributed quotation regarding zealous representation is a quote from Sharswood's essay and credits Sharswood, incorrectly, as the author who "first expressed" the principle of zealous representation. *Id.* See David Hoffman, *Resolutions in Regard to Professional Deportment*, in 2 DAVID HOFFMAN, *A COURSE OF LEGAL STUDY* 752, 758 (2d ed. 1836) ("To my clients I will be faithful; and in their causes, zealous and industrious") [hereinafter Hoffman, *Resolutions*]. Wolfram also observes in a footnote that the *Canons'* drafters closely followed the Alabama Code which was modeled on Sharswood's essay. WOLFRAM, *supra*, at § 2.6.2, n.21.

40. Professor Maxwell Bloomfield views Sharswood as a transitional figure in the move from the gentleman-lawyer ethic which focused on the practitioner's conscience to the modern adversarial ethic focused on "the external guidelines provided by the legal process." Maxwell Bloomfield, *David Hoffman and the Shaping of a Republican Legal Culture*, 38 MD. L. REV. 673, 687 (1979) [hereinafter Bloomfield, *Hoffman*]. In his text on legal ethics, Professor Thomas Shaffer states that Sharswood's essay "finds moral authority in the profession itself." THOMAS L. SHAFFER, *AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS* xxvi, 355-58, 367-68 (1985). Bloomfield and Shaffer, however, neglect the dominant role in Sharswood's text of the republican lawyer's duty to exercise independent moral authority, including the counter-majoritarian protection of property and the responsibility for making moral decisions that could limit client representation. For a discussion of Sharswood's perspective, see *infra* Part III.

41. Dean L. Roy Patterson, in contrast to Professors Shaffer and Bloomfield, neglects Sharswood's commitment to the adversarial system. Patterson mistakenly argues that Sharswood articulates a vision

Although the misreading of Sharswood will be discussed in Part V.A. *infra*, one example demonstrates that ignorance of Sharswood's work has distorted modern understanding of the legal ethics codes. Commentators generally assert that legal ethics originated in Henry Brougham's famous "credo" that "[a]n advocate, in the discharge of duty, knows but one person in all the world, and that person is his client."<sup>42</sup> Indeed, one leading commentator has described Brougham's statement as "[t]he legal profession's basic narrative . . . sustained over two centuries' notwithstanding pervasive changes in American society and in the profession itself."<sup>43</sup>

An examination of Sharswood's essay raises questions about the wisdom of this description. Sharswood's work, which was the basis for the *Canons* and later evolved into the *Model Code* and the *Model Rules*, expressly rejects Brougham's credo as the basis for legal ethics standards.<sup>44</sup> The remainder of this article will explain Sharswood's republican conception of legal ethics standards and consider its implications for our current understanding of the legal ethics codes.

### III. GEORGE SHARSWOOD'S VISION OF LEGAL ETHICS<sup>45</sup>

#### A. BACKGROUND

In 1854, when George Sharswood wrote his essay on professional ethics, he was Dean of the University of Pennsylvania Law School and a sitting Judge in the Pennsylvania courts.<sup>46</sup> He had been a Democratic legislator

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of reciprocal agency between lawyer and client, even though Sharswood never suggests that the client is the agent of the lawyer. L. Roy Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 913 (1980). Patterson also errs in suggesting that Sharswood did not value the duty of confidentiality. *Id.* at 915. Although Patterson does recognize the survival in the modern codes of Sharswood's emphasis on the "duties of candor and fairness," he fails to recognize how the survival of Sharswood's vision in the language of the modern codes qualifies the adversarial ethic. *Id.* at 912-15.

42. LUBAN, *supra* note 38, at 54-55. See also, e.g., FREEDMAN, *supra* note 34, at 65-66 (describing Brougham's credo as "classic statement" of ideal of zealous representation); Hazard, *supra* note 34, at 144 (describing Brougham's credo as "profession's basic narrative"); WOLFRAM, *supra* note 39, at 580 (stating that Brougham's credo today "reflect[s] the dominant, although hardly universal, professional ethic"). In 1820, Lord Brougham made these comments in the House of Lords as part of his defense of Queen Caroline against charges of adultery brought on behalf of George IV. DAVID MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 188-89 (1973). Brougham's comments implied a threat to reveal the King's previous secret marriage to a Roman Catholic, which would potentially have thrown England into turmoil. *Id.* Ultimately, the charges against Queen Caroline were dropped. *Id.* See also Thomas L. Shaffer, *Lord Brougham — the devious advocate*, RES GESTAE 184 (Oct. 1983).

43. Hazard, *supra* note 34, at 1244.

44. See discussion *infra* Part III.B.3.

45. This analysis of Sharswood's vision is based on his essay on professional ethics, Sharswood, *supra* note 3, and not the whole corpus of his work.

46. Samuel Dickson, *George Sharswood*, in 6 GREAT AMERICAN LAWYERS 123, 134-37, 144-46 (1909); 9 DICTIONARY OF AMERICAN BIOGRAPHY 28-29 (Dumas Malone, ed., Charles Scribner's Sons 1964)(1935) [hereinafter DICTIONARY].



and was elevated to the Supreme Court of Pennsylvania in 1867 where he eventually served as Chief Justice.<sup>47</sup> As a scholar, Sharswood was best known for his annotations of English treatises, including an edition of Blackstone that was reputed to be the most popular in nineteenth-century America.<sup>48</sup> His best known original work was his essay on ethics, which was based on his lectures to the students of the University of Pennsylvania Law School.<sup>49</sup>

At the time Sharswood wrote, many of the practices and institutions now considered basic to the profession had been introduced, including the systematic publication of cases, the publication of learned treatises and the establishment of law schools.<sup>50</sup> After mixed success early in the nineteenth century, law schools were moving toward established status by mid-century.<sup>51</sup> Sharswood is often described as the founder of the University of Pennsylvania's Law School even though the law school officially opened many years before Sharswood's tenure.<sup>52</sup>

The legal profession of the early nineteenth century faced challenges similar to those facing the profession today. At the forefront of debate within and outside the profession were questions regarding whether law was a business or a profession<sup>53</sup> and whether a lawyer should serve as a "hired gun" for clients.<sup>54</sup> The challenge to a lawyer's adversarial role arose both from those who distrusted the role of law and lawyers in making determinations of right and wrong,<sup>55</sup> and those who challenged the lawyer's

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47. Dickson, *supra* note 46, at 131-33, 146; *DICTIONARY*, *supra* note 46, at 28-29; Gary Nash, *The Philadelphia Bench and Bar, 1800-1861*, 7 *COMP. STUDIES IN SOC. & HIST.* 203, 207-08 (1965).

48. Dickson, *supra* note 46, at 144-46; *Memorial*, in *GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS* 5 (5th ed. 1884).

49. Dickson, *supra* note 46, at 144; *DICTIONARY*, *supra* note 46, at 28-29.

50. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 322-33 (1985); PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA* 109-10 (1965).

51. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 1-21 (1983); Nash, *supra* note 47, at 207-08.

52. Dickson, *supra* note 46, at 144-46. The law school was closed when its founder retired and it did not continuously operate again until Sharswood's professorship. *See also* Nash, *supra* note 47, at 207-08; *DICTIONARY*, *supra* note 46, at 29.

53. Compare MILLER, *supra* note 50, at 99-116 (describing nineteenth century views of lawyers as disinterested experts in the science of justice) and Bloomfield, *Hoffman*, *supra* note 40 (characterizing lawyers as agents of the common good) with MAXWELL BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY* 1776-1876 150-51 (1976) [hereinafter BLOOMFIELD, *AMERICAN LAWYERS*] (describing nineteenth century views of law as merely a business). Bloomfield quotes an 1856 commentator as stating of lawyers "[w]e are clever men of business, as a mass, and no more." *Id.* *See* GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 284, 323-25, 346 (1991) [hereinafter WOOD, *RADICALISM*].

54. MILLER, *supra* note 50, at 100-04, 187, 203-06 (1965).

55. BLOOMFIELD, *AMERICAN LAWYERS*, *supra* note 53, at 145; MILLER, *supra* note 50, at 102-04; Nash, *supra* note 47, at 210-14; WOOD, *RADICALISM*, *supra* note 53, at 284, 323-25.

role as an advocate in an adversarial system.<sup>56</sup> The latter critics claimed that justice, good and evil could be readily known.<sup>57</sup> Therefore, a profession of experts to serve as intermediaries between lay persons and the justice system was not necessary.<sup>58</sup> They also argued that in disputes one party is necessarily wrong and lawyers' advocacy of this wrong position would only obfuscate the truth.<sup>59</sup>

## B. A REPUBLICAN VISION OF LEGAL ETHICS

Sharswood attempted to address these concerns by proposing a system of legal ethics that embraced a republican vision of the lawyer's role. This vision conceived a lawyer's first obligation to be the common good: the rule of law and the protection of property rights. Once that duty was satisfied, lawyers owed a duty of loyal and zealous representation to their clients. Sharswood addressed much of his study of legal ethics to the task of balancing these sometimes competing adversarial and republican obligations.<sup>60</sup>

### 1. The Republican Role of Lawyers

Historians have traced the roots of republicanism to ancient Rome,<sup>61</sup> Renaissance Italy,<sup>62</sup> and to English opposition thought.<sup>63</sup> Professor William Treanor has noted that "[a]t the center of republican thought lay a belief in a common good and a conception of society as an organic whole. The state's proper role consisted in large part of fostering virtue, of making the individual unselfishly devote himself to the common good."<sup>64</sup> According to

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56. MILLER, *supra* note 50, at 104, 187 (describing "old Puritan hostility to lawyers as being men sworn to advocate any case regardless of its merits").

57. MILLER, *supra* note 50, at 100-04.

58. MILLER, *supra* note 50, at 102-04; Nash, *supra* note 47, at 210-14.

59. MILLER, *supra* note 50, at 187 (stating that under the influence of "revivalist morality" the "inevitable accusation arose: lawyers . . . by the very nature of their calling . . . are dishonest. They are committed to vindicating their client regardless of the merits of his cause, to making the worse appear the better case").

60. His strong commitment to adversarial obligations distinguished him from David Hoffman, whose resolutions were the only major American guidelines for legal ethics prior to Sharswood's Essay. See Bloomfield, *Hoffman*, *supra* note 40, at 687. Indeed, Professors Bloomfield and Shaffer have incorrectly argued that Sharswood's commitment to adversarial ethics led him to neglect republican obligations. See note 40 *supra*.

61. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 24-93 (1967) and GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* 46-90 (1969) [hereinafter WOOD, CREATION].

62. J.G.A. Pocock, *The Machiavellian Moment Revisited: A Study in History and Ideology*, 53 J. MOD. HIST. 49 (1981).

63. BAILYN, *supra* note 61, at 35.

64. William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 699 (1985) [hereinafter Treanor, *Origins*]. See WOOD, CREATION, *supra* note 61, at 53; WOOD, *RADICALISM*, *supra* note 53, at 104-05.

what most historians consider the dominant ideological force behind the American Revolution,<sup>65</sup> individuals had little to fear from republican government which emphasized the right of the people to participate in the political system.<sup>66</sup> The legislature, "[a]s the voice of the people, . . . could be trusted to perceive the common good and to define the limits of individual rights."<sup>67</sup>

Traditional republican thought saw in commerce and the attendant pursuit of self-interest a threat to proper governance and to virtue.<sup>68</sup> Persons "involved in the marketplace were usually overwhelmed by their [self-]interests and were incapable of [the] disinterestedness" necessary to virtue and realization of the common good.<sup>69</sup> Moreover, "[w]ealth encouraged greed in its possessors and enabled them to wield undue power."<sup>70</sup>

In the wake of the American Revolution, influential republican thinkers came to reconsider this view, accepting and in some cases even welcoming the role of wealth and commerce in society. Professor Gordon Wood has observed that many republicans conceded "that private interest ruled most social relationships . . . [and that] to expect most people to sacrifice their private interests for the sake of the public good was utopian."<sup>71</sup> In the economic sphere, some republicans adopted theories that recognized both the inevitability and the legitimacy of self-interest.<sup>72</sup> For example, a leading historian has brought forth James Madison's argument that "republican governments must protect the rights of property, as well as of persons" in part to encourage industry with the incentive of potential wealth.<sup>73</sup>

Despite this shift, thinkers like Madison remained distinctly republican because they did not give up hope for "virtuous politics" predicated on the

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65. For discussions of the relevant historical literature, see, e.g., Gordon Wood, *Hellfire Politics*, N. Y. REV. OF BOOKS, Feb. 28, 1985 at 28; Robert Shalhope, *Republicanism and Early American Historiography*, 39 WM. & MARY Q. 334, 334-37 (1982).

66. WOOD, CREATION, *supra* note 61, at 61-63.

67. *Id.* at 134.

68. DREW R. MCCOY, *THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA* 67-70 (1980); Treanor, *Origins*, *supra* note 64, at 699-70; WOOD, CREATION, *supra* note 61, at 88-89, 413-25; WOOD, RADICALISM, *supra* note 53, at 104-06.

69. WOOD, RADICALISM, *supra* note 53, at 106.

70. Treanor, *Origins*, *supra* note 64, at 699.

71. WOOD, RADICALISM, *supra* note 53, at 252-53.

72. William Michael Treanor, *Taking the Framers Seriously*, 55 U. CHI. L. REV. 1016, 1035-1037 (1988) (reviewing WALTER BERNIS, *TAKING THE CONSTITUTION SERIOUSLY* (1987)).

73. DREW R. MCCOY, *THE LAST OF THE FATHERS: JAMES MADISON & THE REPUBLICAN LEGACY* 193-94 (1989). Professors McCoy and Wood view Madison as a republican. See *supra*; see WOOD, RADICALISM, *supra* note 53, at 253. However, many other professors consider Madison to be a liberal. See Treanor, *Origins*, *supra* note 64, at 709 n.85; see Joyce Appleby, *Republicanism in Old and New Contexts*, 43 WM. & MARY Q. 20 (1986). This difference probably occurs because, like many of his contemporaries, Madison's approach included both republican and liberal elements. See JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* 170-83 (1990).

existence of a common good.<sup>74</sup> Even in this, however, there was significant change. Professor Jennifer Nedelsky demonstrates that republicans instead narrowed and altered their view of the scope of government's role.<sup>75</sup> For some republicans the government, rather than promote the virtue of the community, would provide "the preconditions for individuals' capacity to lead the good life . . . ."<sup>76</sup> Others, like Madison, "did not treat character as a basic object of government."<sup>77</sup> They defined the substantive role of government in language "not that of the classical republicans, but of modern liberals. The task of government was to provide security, justice, prosperity and liberty."<sup>78</sup>

Having lost faith in the people's capacity for virtue, these modified republicans viewed the duty of governance as the role of a virtuous elite.<sup>79</sup> Two groups would provide much of this leadership. The first was "disinterested gentry who were supported by proprietary wealth and not involved in the interest-mongering of the market place."<sup>80</sup> The second was "lawyers and other professionals [who] are somehow free of the marketplace, are less selfish and interested and therefore better equipped for political leadership and disinterested decision-making than merchants and businessmen."<sup>81</sup> Accompanying this shift to faith in elites and away from majoritarian processes was a break with traditional republican stress on the centrality of deliberation.<sup>82</sup>

In the structure of government, the ultimate protection against majority interference with the rights necessary to achieve virtue would be the judiciary and the legal system.<sup>83</sup> Professor Gordon Wood has noted that one major way of protecting liberty was to remove issues "such as property and contract rights . . . from popular tampering [by defining them as] 'fixed

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74. WOOD, *RADICALISM*, *supra* note 53, at 253.

75. NEDELSKY, *supra* note 73, at 182.

76. *Id.*

77. *Id.* at 179.

78. *Id.* A leading commentator has, however, observed a similar eighteenth century republican definition of the common good as "consisting of protection for rights and liberties . . . ." Frank I. Michelman, *The Supreme Court, 1985 Term, Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 49 (1986).

79. NEDELSKY, *supra* note 73, at 181.

80. WOOD, *RADICALISM*, *supra* note 53, at 253.

81. *Id.* at 254 (discussing THE FEDERALIST No. 35 (Alexander Hamilton)). See also Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 14 (1988) [hereinafter Gordon, *Independence*] (discussing the idea that lawyers possessed an independent, neutral position in society which enabled them to balance the position of the wealthy at one extreme, and the position of the common people at the other extreme).

82. See Isaac Kramnick, *The "Great National Discussion": The Discourse of Politics in 1787*, 45 WM. & MARY Q. 3, 22-23 (1988).

83. WOOD, *RADICALISM*, *supra* note 53, at 324.

principles of law to be determined by judges.'"<sup>84</sup>

In the context of this modified republicanism, Professor Robert Gordon has described what he calls the "traditional 'republican ideal' " of the lawyers' role.<sup>85</sup> In this ideal, lawyers possess the independence from faction necessary for virtue in addition to a counter-majoritarian obligation to protect property and other rights.<sup>86</sup> Last, they have a responsibility "to serve as a policy intelligentsia . . . and to use the authority and influence deriving from their public prominence and professional skill to create and disseminate, both within and without the context of advising clients, a culture of respect for and compliance with the purposes of the laws."<sup>87</sup>

Professor Gordon's description of the republican lawyer's role accords with Alexis de Tocqueville's famous observations. Although not a republican, Tocqueville in *Democracy in America* described lawyers as the leaders of American government.<sup>88</sup> Lawyers protected the seemingly contradictory interests of democratic institutions and property interests.<sup>89</sup> While lawyers' work drew them toward the interests of property and order,<sup>90</sup> Tocqueville wrote, "their disproportionate influence results from the existence of democratic, rather than aristocratic or oligarchic, governance."<sup>91</sup> Similar to Professor Gordon's description of the republican tradition of lawyering, Tocqueville observed that lawyers used democratic institutions, especially the jury system, to promote public acceptance of counter-majoritarian values.<sup>92</sup>

84. *Id.*

85. Gordon, *Independence*, *supra* note 81, at 14.

86. *Id.*

87. *Id.*

88. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 270 (J. P. Mayer ed. & George Lawrence trans., 1969).

89. De Tocqueville observes that lawyers' "tastes naturally draw lawyers toward the aristocracy and the prince and their interest as naturally pulls them toward the people." *Id.* at 266.

90. Tocqueville notes that:

[t]he exercise of their profession daily reminds them of this superiority; they are the masters of a necessary and not widely understood science; they serve as arbiters between the citizens; and the habit of directing the blind passions of the litigants toward the objective gives them a certain scorn for the judgment of the crowd.

*Id.* at 264.

91. Their very status as aristocrats by merit and not by birth resulted from the existence of democratic institutions. "In America," Tocqueville observed, "there are neither nobles nor men of letters, and the people distrust the wealthy. Therefore, the lawyers form the political upper class and the most intellectual section of society." *Id.* at 268.

92. Tocqueville noted that:

[t]here is hardly a political question in the United States which does not sooner or later turn into a judicial one . . . . As most public men are or have been lawyers, they apply their legal habits and turn of mind to the conduct of affairs. Juries make all classes familiar with this. So legal language is pretty well adopted into common speech; the spirit of the law . . . infiltrates through society right down to the lowest ranks, till finally the whole people contracted some of the ways and tastes of a magistrate.

The role that Gordon and Tocqueville describe encompasses Sharswood's vision of the role of the lawyer. More broadly, Sharswood's vision is consistent with the modified republicanism that historians have found to be influential in the post-revolutionary era.

While Sharswood did not use the term "republicanism," he did expressly discuss the Roman Republic, which embodied the principle of republicanism.<sup>93</sup> Sharswood's view of government accords with Professor Nedelsky's description of the republican perspective that "government would provide the precondition for individuals' capacity to lead the good life . . ."<sup>94</sup> Sharswood wrote that government exists to provide the liberal objective of "security of life, liberty and property . . ."<sup>95</sup> With this security, an individual could pursue the republican objective of "perfection of . . . physical, intellectual, and moral powers, in order to give the fullest return to the labor of his hands, and to secure the greatest advantages in knowledge and wisdom."<sup>96</sup>

Government promoted these ends through legislation "advancing or securing the general good"<sup>97</sup> and through "the impartial administration of equal and just laws."<sup>98</sup> Threats to governmental protection of order, liberty, and property come from persons who seek to promote their interests at the expense of the rights and interests of others. The threat to property rights was greater than to liberty. The rights of "[p]ersonal liberty, trial by jury, the elective and other political franchises, liberty of conscience, of speech and of the press, are able to protect themselves in a great measure from their own democratic affinities."<sup>99</sup> Property, which often benefitted the few rather than the majority, would not benefit from such "democratic affinities," and therefore had "an especial claim to protection against the government itself."<sup>100</sup> Indeed, through judicial review, property rights were protected from the "power of majorities."<sup>101</sup>

In Sharswood's vision of the lawyer's role, much as Professor Gordon describes the republican model of lawyering, lawyers provided the enlightened political leadership that protected "life, liberty, and property." Sharswood observed that "more frequently than from any other profession,

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*Id.* at 270.

93. Sharswood, *supra* note 3, at 137-42.

94. See NEDELSKY, *supra* note 73, at 182.

95. Sharswood, *supra* note 3, at 53.

96. *Id.* at 16.

97. *Id.* at 15.

98. *Id.* at 20.

99. *Id.* at 35.

100. *Id.* at 21.

101. *Id.* at 31.

[lawyers] fill the highest public stations,"<sup>102</sup> including dominance of the legislative process,<sup>103</sup> and exclusive administration of the judicial system as advocates and judges.<sup>104</sup> Lawyers were experts schooled in the science of law and capable of impartial, or in classic republican terms "virtuous" legislation and jurisprudence.<sup>105</sup>

Sharswood provided illustrations of the lawyer's duty to society. Lawyers were to secure "[t]he obligation of contracts" and restrict "the right of eminent domain . . . by the provision for compensation."<sup>106</sup> Protection of contract and property rights also required clear, predictable rules, the achievement of which required vigilant defense of *stare decisis* and prohibition of retroactive legislation.<sup>107</sup> Judicial respect for precedent and legislative avoidance of class legislation were necessary to impartial governance.<sup>108</sup> To limit interference with liberty, the taking of property through taxation should be limited to the extent necessary to protect life, liberty, and property.<sup>109</sup>

Protecting property by influencing judicial and legislative processes was only part of the obligation of Sharswood's ethical lawyer. Similar to the observations of Professor Gordon and of Tocqueville, Sharswood suggested that lawyers had a duty to secure popular acceptance of the lawyers'

102. *Id.* at 26; see also *id.* at 54.

103. *Id.* at 25.

104. *Id.* at 30-31.

105. *Id.* at 25-31, 52-53.

106. *Id.* at 35.

107. *Id.* at 40-41, 52-53. Sharswood noted that rejection of *stare decisis* results in the evil of judicial legislation. Judicial laws create uncertainty and confusion. *Id.* at 52-53. Judicial laws:

are always *retrospective*, but worse on many accounts than *retrospective statutes*. Against the latter we have at least the security of the constitutional provision that prohibits [*ex post facto* legislation and impairment of contracts.] There is no such constitutional provision against judicial legislation. It sweeps away a man's rights, vested, as he had reason to think, upon the firmest foundation, without affording him the shadow of redress. . . . When a court overrules a previous decision, it does not simply repeal it; it must pronounce it never to have been law.

*Id.* at 45.

108. Sharswood asserted that class legislation, such as altering the standard of value in the interest of the debtor class, is unequal and unjust, and leads to speculation, luxury, boom, and bust. *Id.* at 19-21. A similar problem results from retrospective legislation. For a lawyer to seek retrospective legislation on behalf of a client was "a flagrant case of professional infidelity and misconduct." *Id.* at 25.

109. *Id.* Sharswood further states that:

[o]ne grievous invasion of property . . . is . . . taxation for objects not necessary for the common defence and general welfare. Men have a right not only to be well governed, but to be cheaply governed. . . . To compel men to contribute of the earnings or accumulations of industry, their own or inherited, to objects beyond this, not within the legitimate sphere of legislation, to appropriate the money in the public treasury to such objects, is a perversion and abuse of the powers of government, little if anything short of legalized robbery.

*Id.* at 21-22.

counter-majoritarian values. In this effort, Sharswood's own language illustrated how the language of democracy and equality could be used to defend counter-majoritarian values. Sharswood argued that a legal system that respected order and property would provide equal justice under law,<sup>110</sup> and would protect the widow and orphan as well as the business person.<sup>111</sup> The legal profession, in its republican role, "counsel[ed] the ignorant, defend[ed] the weak and oppressed, and . . . [stood] forth on all occasions as the bulwark of private rights against the assaults of power."<sup>112</sup>

Employing this democratic language, the legal profession sought to gain the confidence of and "to diffuse sound principles among the people."<sup>113</sup> The profession did so in providing counsel to clients, making arguments in court to judge and jury, and through publications.<sup>114</sup> Lawyers succeeded in this effort because of their pervasive role in government which "comes home so nearly to every man's fireside."<sup>115</sup>

## 2. The Lawyers' Adversarial Role

After describing lawyers as republican public servants, Sharswood's essay then explained their adversarial role. Sharswood discussed why an adversarial system was necessary and whether this type of system would result in lawyers aiding injustice by arguing for the "wrong side."<sup>116</sup> Sharswood defended the adversarial system as the best, though imperfect, method of deciding disputes. In this type of system, a neutral judge and jury decided issues of law and fact after full presentation of evidence and arguments by adversary parties.<sup>117</sup> For this system to work, the advocate who presented the party's case must present it as well as possible and was "not morally responsible" for the party.<sup>118</sup> If lawyers as advocates had full moral responsibility for their clients, "they would usurp[] the functions of both judge and jury."<sup>119</sup>

Sharswood also explained why professional advocates were necessary. A complex system of law required expertise, as did presentation of a case in court and parties were not likely to possess this expertise.<sup>120</sup> Moreover, the

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110. *Id.* at 30.

111. *Id.* at 53.

112. *Id.* at 53-54.

113. *Id.* at 54, 30.

114. *Id.* at 30-31.

115. *Id.*

116. *Id.* at 81-82.

117. *Id.* at 83-84.

118. *Id.*

119. *Id.* at 84.

120. *Id.* at 83-84. Referring to the Athenian and Roman republics, Sharswood observed that "[i]n all countries advanced in civilization, and whose laws and manners have attained any degree of refine-



same complexity that made the profession of law a practical necessity also required the profession as a guarantor of relative equality between the parties.<sup>121</sup> Without counsel, "there would be a very great inequality between [parties], according to their intelligence, education and experience, respectively."<sup>122</sup>

### 3. Balancing the Republican and Adversarial Roles

Sharswood reconciled the lawyer's republican and adversarial roles by creating an ethical system which valued both. His attempt to resolve "the limits of [the lawyer's] duty when the legal demands or interests of [the] client conflict with his own sense of what is just and right . . ." <sup>123</sup> focused on the tension between these roles. Sharswood acknowledged that no conflict existed for proponents of the adversarial view that "all causes are to be taken by [a lawyer] indiscriminately, and conducted with a view to one single end, *success*," which he described as the "prevailing tone of professional ethics."<sup>124</sup> Indeed he noted that this ethic had been eloquently described by Lord Brougham "in his justly celebrated defence of the Queen," when he asserted that "[a]n advocate . . . in the discharge of his duty knows but one person in all the world, and that person is his client."<sup>125</sup> Lord Brougham proposed that the lawyer's first and only duty was "[t]o save that client by all means and expedients, and at all hazards and costs to other persons, and among them to himself."<sup>126</sup> The lawyer should not consider the implications of actions for third parties, even if it causes "alarm . . . torments, [and] destruction."<sup>127</sup> Lord Brougham noted that the lawyer must even "[s]eparat[e] the duty of a patriot from that of an advocate," and represent the client zealously even if it would put the "country in confusion."<sup>128</sup>

While a strong defender of the adversarial system in principle,<sup>129</sup> Sharswood rejected Brougham's approach. Sharswood acknowledged that the successful functioning of an adversarial system required the legal profession to provide access to the courts for all. However, in light of the lawyer's

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ment, there has arisen an order of advocates devoted to prosecuting or defending the lawsuits of others." *Id.* at 136-37.

121. *Id.* at 95.

122. *Id.*

123. *Id.* at 81.

124. *Id.* at 84.

125. *Id.* at 87. See discussion of Lord Brougham *supra* text accompanying note 42.

126. Sharswood, *supra* note 3, at 87.

127. *Id.*

128. *Id.*

129. See Sharswood, *supra* note 3, at 82-84 ("The party has a right to have his case decided upon the law and the evidence, and to have every view presented to the minds of the judges.").

republican role, such an adversarial system could not require each individual lawyer to represent any client and to seek the greatest success for every client represented.<sup>130</sup> Accordingly, Sharswood endorsed Pennsylvania Chief Justice Gibson's repudiation of the "'popular but gross mistake . . . to suppose that a lawyer owes no fidelity to anyone except his client . . .'"<sup>131</sup> Justice Gibson urged the contrary view that the lawyer was a public officer with duties to the public<sup>132</sup> and the court<sup>133</sup> as well as the client. He observed that "[t]he high and honorable office of a counsel would be degraded to that of a mercenary were [the lawyer] compelled to do the biddings of his client against the dictates of his conscience."<sup>134</sup>

At the same time, Sharswood rejected the idea that lawyers should only argue just causes. He recounted the story of Sir Matthew Hale, who attempted this non-adversarial approach. Hale advised clients that he would not assist them further if he determined that their "cause was unjust" and that they should settle their case if it was weak. According to Sharswood, however, Hale changed his views when he discovered that two cases which "by ignorance of the party or their attorney" seemed bad cases "at first," were "very good and just" after further inquiry.<sup>135</sup>

Sharswood recognized that the attempt to balance the sometimes conflicting republican and adversarial roles was "delicate and dangerous ground" where "it [would] often be hazardous to condemn either client or counsel upon what appears only."<sup>136</sup> This effort to balance the lawyer's republican and adversarial roles became the focus of Sharswood's effort to create ethical standards to guide lawyers' conduct which was to become the foundation for the modern legal ethics codes.

#### IV. THE DEVELOPMENT OF THE LEGAL ETHICS CODES FROM SHARSWOOD TO THE CANONS AND LATER CODIFICATIONS

Sharswood's effort to resolve the lawyer's adversarial and republican duties resulted in his prescription of broad standards for lawyers. Republican

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130. Sharswood, *supra* note 3, at 90.

131. *Id.* at 96-97 (quoting *Rush v. Cavanaugh*, 2 Pa. 187, 189 (1845)).

132. Sharswood wrote that the lawyer is

the incumbent of an office—an office in the administration of justice—held by authority from those who represent in her tribunals the majesty of the commonwealth, a majesty truly more august than that of kings or emperors. It is an office, too, clothed with many privileges—privileges, some of which are conceded to no other class or profession.

*Id.* at 58-59 (footnotes omitted).

133. *Id.*

134. *Id.* at 97 (quoting *Rush v. Cavanaugh*, 2 Pa. 187, 189 (1845)).

135. *Id.* at 88 (footnote omitted).

136. *Id.* at 89.

lawyers would not need many detailed or binding rules. Sharswood's essay provided all the necessary guidance on the scope and content of the lawyer's adversarial and republican duties, as well as instruction on how to resolve potential conflicts between those duties.

The 1908 *Canons* largely borrow text and standards from Sharswood, and the *Code* and the *Rules* continue the substance of the *Canons*.<sup>137</sup> These codifications, by virtue of borrowing Sharswood's text, incorporate his theoretical perspective. While the modern codes, unlike Sharswood, do not spell out obligations to protect property and otherwise limit lawful zealous representation, they continue the republican vision by maintaining Sharswood's hierarchy of duties and by affording lawyers broad discretion to permit the exercise of conscience in client representation. At the same time, however, the codes retreat from the republican perspective in form and enforcement provisions by moving from Sharswood's hortatory norms to legally binding rules.

#### A. SHARSWOOD'S ESSAY

Sharswood's republican vision of lawyering influenced both the form and content of his ethical standards. In the context of republican lawyers, broad guidelines sufficed to ensure ethical standards. Moreover, the content of the standards reflected a strong commitment to the lawyer's adversarial duties which yielded only to the higher republican duties.

##### 1. Form and Enforcement

Underlying Sharswood's reliance on broad guidelines was his republican confidence that most lawyers were capable of virtue, and would act virtuously if they understood how to do so. Like a member of the clergy,<sup>138</sup> a lawyer should follow "[h]igh moral principle [as] his only safe guide; the only torch to light his way amidst darkness and obstruction."<sup>139</sup> While suited to pursue high moral virtue, such a vague aspiration failed to provide adequate guidance to practitioners facing conflicting republican and adversarial duties.<sup>140</sup> Sharswood therefore offered "some accurate and intelligible rules by which to guide and govern the conduct of professional life,"<sup>141</sup> including assisting the lawyer "in coming to a safe conclusion *in foro conscientiae* [in the forum of conscience], in the discharge of profes-

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137. See discussion *supra* Part II.A.

138. *Id.* at 55.

139. *Id.*

140. *Id.* at 56.

141. *Id.*

sional duty.”<sup>142</sup> Not only would most lawyers follow these standards, but the generally high standards of lawyers would result in the market, together with the legal community, reinforcing high ethical standards.<sup>143</sup> Sharswood relied on this theme throughout his essay.<sup>144</sup>

Sharswood’s model of behavior in the legal community and the market assumed the presence of shared values in the legal profession. Only a community bound by similar values would consistently reward ethical conduct and penalize unethical conduct. Sharswood expressed his belief in the high ethical standards of the bar when he wrote that “no man can ever be a truly great lawyer, who is not in every sense of the word, a good man.”<sup>145</sup>

The model also assumed that lawyers are experts to whom consumers defer in evaluating legal services. As Sharswood observed, “[s]ooner or later, the real public—the business men of the community, who have important lawsuits, and are valuable clients—endorse the estimate of a man entertained by his associates of the Bar, unless indeed there be some glaring defect of popular qualities.”<sup>146</sup> Similarly, Sharswood described how a young attorney could build a law practice through ethical conduct.<sup>147</sup>

Sharswood’s model further assumed a small community of lawyers and clients who had frequent contact with each other.<sup>148</sup> This regular contact was necessary for lawyers to be able to appraise the character and competence of their colleagues.<sup>149</sup> Similarly, clients required frequent contact

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142. *Id.* at 90.

143. In contrast, modern commentators often complain that market forces undermine lawyers’ ethics. See, e.g., Robert McKay, *The Rise of the Justice Industry and the Decline of Legal Ethics*, 68 WASH. U.L.Q. 829 (1990).

144. Examples include his discussion of courtesy and candor to the court (Sharswood, *supra* note 3, at 64, 72-73), courtesy and candor to the bar (*id.* at 73), and courtesy to witnesses (*id.* at 119-20). Indeed, he suggested that the market may work better in the legal profession than it does generally in other professions: “Among merchants, so many honest men become involved through misfortune, that the rogue may hope to take shelter in the crowd, and be screened from observation. Not so the lawyer. If he continues to seek business, he must find his employment in lower and still lower grades.” *Id.* at 170-71.

145. *Id.* at 168.

146. *Id.* at 75.

147. [L]et business seek the young attorney; and though it may come in slowly, and at intervals, and promise in its character neither fame nor profit, still, if he bears in mind that it is an important part of his training that he should understand the business he does thoroughly, that he should especially cultivate, in transacting it, habits of neatness, accuracy, punctuality, and despatch, candor towards his client, and strict honor towards his adversary, it may be safely prophesied that his business will grow as fast as it is good for him that it should grow. . . .

*Id.* at 131-32.

148. For a modern discussion of the advantages of “repeat players” in the legal system, see Marc Galanter, *Why the “Haves” Come Out Ahead: Speculation on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974).

149. Sharswood, *supra* note 3, at 73-76.

with lawyers to learn their perspectives and to gain confidence in their judgment.<sup>150</sup>

Under this model, with lawyers capable of achieving virtue, and consequently with the legal community and the market reinforcing ethical standards, an essay like Sharswood's, which explained ethical standards, would by and large suffice to encourage compliance with those standards over the long term. Only where a single ethical violation was so egregious that it threatened the legitimacy of the system would it be necessary to impose the disciplinary sanction of suspension or disbarment.<sup>151</sup>

## 2. The Content of Sharswood's Code

Sharswood's ethical guidelines balanced adversarial and republican obligations. The adversarial duty required zealous representation. The republican duty, however, required that zealous representation yield when it conflicted with the lawyer's duty as a republican guardian of the law.

### a. Adversarial Duties

Sharswood viewed the lawyer's obligation to the client as "immovable fidelity."<sup>152</sup> Although the lawyer's legal obligation was "ordinary care and ordinary skill"<sup>153</sup> the lawyer's "moral responsibility [was e]ntire devotion to the interest of the client, warm zeal in the maintenance and defence of his rights, and the exertion of his utmost learning and ability."<sup>154</sup> In detailing duties arising from fidelity to the client, Sharswood recognized ethical standards which fall within the duties of loyalty, confidentiality, and competence which comprise much of the modern ethics of lawyering.

The duty of loyalty prohibited conflicts. Sharswood instructed that the lawyer may not "tak[e] fees of two adversaries."<sup>155</sup> At time of retainer, the lawyer must disclose potential conflicts with both current and former clients.<sup>156</sup> Loyalty also required the lawyer to avoid conflicts with the lawyer's own interests that could arise from business transactions with clients, even

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150. *See id.* at 75.

151. An example of an ethical violation warranting the imposition of suspension or disbarment is *ex parte* contact with jurors. *Id.* at 67-68.

152. *Id.* at 117. "Immovable fidelity" is defined as the lawyer's complete identification with the client. *Id.*

153. *Id.* at 76.

154. *Id.* at 77-80. This language is quoted in the Canons. *See supra* note 19.

155. Sharswood, *supra* note 3, at 117.

156. Such conflicts included "every circumstance of his own connection with the parties or prior relation to the controversy" as well as "every adverse retainer, and even every prior retainer." *Id.* at 109-10. Absent disclosure, a client had a right to presume that no conflicts existed. *Id.*

when unrelated to the representation,<sup>157</sup> as well as from contingent fee arrangements which in effect made lawyers and clients business partners.<sup>158</sup>

The duty of loyalty implicated other fiduciary duties. These included safeguarding client funds,<sup>159</sup> and candor in advising the client of the lawyer's view of the merits and likely outcome.<sup>160</sup>

A related and special duty of loyalty was the duty of confidentiality. Sharswood phrased the duty in terms of the privilege.<sup>161</sup> Sharswood wrote that the attorney-client privilege required that the lawyer keep the client's confidences,<sup>162</sup> even if the lawyer learned of the criminal defendant's guilt<sup>163</sup> or of facts damaging to his client's civil case.<sup>164</sup>

In addition to loyalty and confidentiality, Sharswood prescribed a duty of competence. Competence had a number of components, including thorough preparation,<sup>165</sup> punctuality,<sup>166</sup> attention to detail,<sup>167</sup> and continuing education, especially for young lawyers, in law<sup>168</sup> and liberal arts.<sup>169</sup>

### b. Republican Duties

Sharswood prescribed republican duties which were both independent of, and conflicting with, adversarial duties. Independent of adversarial obligations was the duty to the impartial administration of justice. This is the obligation that is described today as a *pro bono* obligation. In criminal

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157. Sharswood noted that "[a]ll transactions of business between attorney and client are looked upon with eyes of suspicion and disfavor, in courts of justice." *Id.* at 164-65. For similar reasons, a lawyer should accept no gifts during the representation or compensation greater than the agreed amount. *Id.* at 165.

158. *Id.* at 160-62.

159. *Id.* at 166.

160. *Id.* at 107-08.

161. Although modern commentators distinguish between the attorney-client privilege and the duty of confidentiality, *see, e.g.*, GEOFFREY C. HAZARD, JR. AND SUSAN KONIAK, *THE LAW AND ETHICS OF LAWYERING* 185-86 (1990), the use of the privilege as a way of referring to confidentiality persisted at least as recently as the Model Code. *See* MODEL CODE DR 4-101 (stating that the duty of confidentiality applies to information protected by attorney-client privilege in addition to client "secrets").

162. Sharswood, *supra* note 3, at 106-07.

163. *Id.* at 105-07.

164. *Id.* at 84-85.

165. *Id.* at 120-21.

166. *Id.* at 123.

167. *Id.*

168. *Id.* at 125-29.

169. Of lawyers who restrict themselves to legal reading, Sharswood observed:

There is great danger that law reading, pursued to the exclusion of everything else, will cramp and dwarf the mind, shackle it by the technicalities with which it has become so familiar, and disable it from taking enlarged and comprehensive views, even of topics falling within its compass, as well as of those lying beyond its legitimate domain.

*Id.* at 133.

cases, ethical lawyers should not refuse court assignment to represent indigent defendants.<sup>170</sup> In civil matters, a lawyer had a duty to represent the poor for little or no fee.<sup>171</sup> Sharswood conceived "that the time will never come . . . when a poor man with an honest cause, though without a fee, cannot obtain the services of honorable counsel, in the prosecution or defence of his rights."<sup>172</sup>

Other republican duties related to compensation from clients. While Sharswood acknowledged that the law generally permitted attorneys to sue clients for fees, he urged lawyers to refrain from such suits because they encouraged lawyers' unethical, money seeking impulses and undermined the legal community's public image.<sup>173</sup> In addition to the objection to contingent fees from the perspective of the duty of loyalty, Sharswood argued that they both "reduc[ed the lawyer] from his high position of an officer of the court and a minister of justice, to that of a party litigating his own claim"<sup>174</sup> and unduly encouraged litigation.<sup>175</sup>

Limiting the lawyer's adversarial duties were republican duties circumscribing both the choice of client and the choice of strategy in representing a client. A legal ethic based exclusively on the ethics of the advocacy role in the adversarial system would suggest that a lawyer represent all persons who need representation without regard to the lawyer's evaluation of the merits of the party's case. Indeed, the English barristers adopted this approach in using an ethical standard of first come, first served in choosing clients.<sup>176</sup> Sharswood rejected this model because the decision as to whether to represent a client implicated a lawyer's independent moral judgment. In Sharswood's view, a lawyer violated ethical duties when "consciously press[ing] for an unjust judgment, much more so when he presses for the conviction of an innocent man."<sup>177</sup> A lawyer should not take cases indiscriminately and success should not be the lawyer's only goal when determining whether to accept a case.<sup>178</sup>

Even after the lawyer decided to represent a client, republican duties to

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170. *Id.* at 91 (footnote omitted).

171. *Id.* at 151.

172. *Id.*

173. *Id.* at 147-52.

174. *Id.* at 160.

175. *Id.* at 161. Sharswood recognized an exception for "rates of commission to be charged for the collection of undefended claims," *id.* at 153, apparently because they served a necessary role in protecting property rights. *Id.*

176. Robert S. Alexander, *The History of the Law as an Independent Profession and the Present English System*, in *THE LAWYER'S PROFESSIONAL INDEPENDENCE* 14 (ABA Tort and Insurance Practice Section 1984); see also MELLINKOFF, *supra* note 42, at 164.

177. Sharswood, *supra* note 3, at 97-98 (quoting Chief Justice Gibson in *Rush v. Cavanaugh*, 2 Pa. 187, 189 (1845)).

178. *Id.* at 84.

the law and the legal system tempered zealous representation. Duties to the client were required to yield to duties to the court and the bar. A judicial system that was impartial and also had the confidence of the public was essential to the rule of law. Despite potential benefits to the client, lawyers had a duty to treat courts and judges with respect, even when opposed to "the views expressed or the course pursued by the court,"<sup>179</sup> and to refrain from appealing to jurors to "disregard" the judge's legal directives.<sup>180</sup> Similarly, the duty of fairness and honesty to the court bounded advocacy on behalf of the client,<sup>181</sup> as did prohibitions on *ex parte* contacts with judges and juries.<sup>182</sup>

Also limiting advocacy were duties to the bar. Courtesy to fellow lawyers was both a matter of decency and a necessary condition for lawyers to function as a cooperative community of political leaders with shared values. Therefore, despite potential advantages for the client, a lawyer should keep promises to other lawyers "faithfully and liberally,"<sup>183</sup> and avoid misleading<sup>184</sup> or surprising<sup>185</sup> an opponent. Even despite client instructions to the contrary, a lawyer should "be liberal to the slips and oversights of his opponent wherever he can do so. . . ."<sup>186</sup>

Beyond these particular duties to the bar and the court, the republican lawyer had a duty to virtue or "conscience" that limited the bounds of permissible advocacy.<sup>187</sup> The primary duty of an attorney for the prosecution or a civil plaintiff was, like that of a judge, to follow the lawyer's sense of justice even to the extent of refusing to pursue lawful but immoral goals and even when the civil plaintiff would thereby be denied representation by counsel.<sup>188</sup>

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179. *Id.* at 62-63.

180. *Id.* at 69-71.

181. *Id.* at 72. A further illustration of the extent of the lawyer's duty of honesty to the court is the limit Sharswood imposes on the preparation of affidavits. An ethical lawyer should ask for the client's version of the facts without suggesting which answers would make the best case under the law. *Id.* at 111-12.

182. *Id.* at 66.

183. *Id.* at 73.

184. *Id.*

185. The lawyer who "sits down deliberately to plot a surprise upon his opponent . . . deserves to fall, and in all probability will fall, into the trap which his own hands have laid . . . . If he should succeed, he will have gained with his success not the admiration and esteem, but the distrust and dislike of one of his associates as long as he lives." *Id.* at 73-74.

186. Where the client demanded that the lawyer "be illiberal, . . . he should throw up his brief sooner than do what revolts against his own sense of what is demanded by honor and propriety." *Id.* at 74-75.

187. *Id.* at 110-11.

188. *Id.* at 93-94. Sharswood reconciled the unavailability of counsel with the vitality of the adversarial system by arguing that even without a lawyer, the party could represent himself in court. *Id.* at 96.



In contrast, adversarial principles played a much stronger role in guiding the advocate for criminal or civil defendants. In Sharswood's view, the defendant was a potential victim of the abuse of state authority while the plaintiff was not.<sup>189</sup> Nonetheless, in addition to the limits placed by duties to the court and the bar, republican values still limited the level of advocacy for criminal and civil defendants.

The role of counsel for a criminal defendant derived from the criminal defendant's basic constitutional rights. Sharswood noted that even the guilty have "a constitutional right to a trial according to law[,]""<sup>190</sup> the benefit of counsel, and the presumption of innocence.<sup>191</sup> Even if the lawyer was convinced of the client's guilt—for example, if the client confessed<sup>192</sup>—the lawyer should "exert all his ability, learning, and ingenuity, in such a defence. . . ." <sup>193</sup>

Paralleling his analogy between plaintiff's lawyer and prosecutor, Sharswood treated the defendant in a civil case as similar to the defendant in a criminal case. The fundamental approach was that "[a] defendant has a legal right to require that the plaintiff's demand against him should be proved and proceeded with according to law."<sup>194</sup>

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189. Many modern lawyers would disagree with Sharswood's distinction between defending against a claim and vindicating a right, especially where plaintiffs are poor or are members of subordinated groups. In these cases, they would argue that plaintiff representation is necessary to protect against the abuse of state or corporate power. See, e.g., Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 268-72 (1990) (describing perspectives of public interest lawyers); Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WISC. L. REV. 699, 754-766 (1988).

190. Sharswood, *supra* note 3, at 91.

191. *Id.* at 90-91.

192. *Id.* at 105.

193. *Id.* at 92. An ethic permitting a lawyer to refuse to defend the guilty would deprive defendants of their constitutional right to a fair trial because "the effect would be to deprive a defendant, in such cases, of the benefit of counsel altogether." *Id.* at 96. Unlike Sharswood, David Hoffman urged that lawyers limit their zealotry in representing certain criminals. His Resolution XV states that:

When employed to defend those charged with crimes of the deepest dye, and the evidence against them, whether legal, or moral, be such as to leave no just doubt of their guilt, I shall not hold myself privileged, much less obliged, to use my endeavors to arrest, or to impede the course of justice, by special resorts to ingenuity. . . . Persons of atrocious character, who have violated the laws of God and man, are entitled to no such special exertions from any member of our pure and honourable profession; and indeed, to no intervention beyond securing to them a fair and dispassionate investigation of the *facts* of their cause, and the due application of the law: all that goes beyond this, either in manner or substance, is unprofessional. . .

Hoffman, *Resolutions*, *supra* note 39, at 755-56.

194. Sharswood, *supra* note 3, at 95. Sharswood argued that "if a suit be instituted against a man to recover damages for a tort, the defendant has a right to all the ingenuity and eloquence he can command in his defence, that even if he has committed a wrong, the amount of the damages may not exceed what the plaintiff is entitled to recover." *Id.* at 96. David Hoffman, in contrast, would not pursue a defense (or claim) that he believed "cannot, or rather ought not, to be sustained. . . ." Hoff-

However, even within the parameters of zealous advocacy for criminal and civil defendants, Sharswood's guidelines suggested six limiting principles. The first three derived from the lawyer's independent moral responsibility and applied to representation of both criminal and civil defendants. First, the lawyer should not put his integrity at issue by expressing a personal opinion even when it was an honest one.<sup>195</sup> Second, the lawyer should not sacrifice personal integrity by making arguments the lawyer knows are contrary to the facts or law.<sup>196</sup> Third, the virtuous lawyer must be respectful to opposing parties and witnesses even if the client instructed the lawyer to the contrary.<sup>197</sup>

The fourth, fifth, and sixth principles appear only to have applied to representation of civil defendants. Fourth, while zealous representation was the goal for defense against an "unrighteous claim," defense against a "righteous claim" should be limited to assuring the defendant "a fair trial on the merits in open court."<sup>198</sup> Fifth, as a steward of property rights, the lawyer should refuse to pursue legal goals that frustrate legitimate property rights, such as by helping a client use legal means to avoid the "just demands of creditors."<sup>199</sup> Sixth, with every client, the lawyer should seek to persuade the client to pursue the result that is best for the legal system.<sup>200</sup>

man, *Resolutions*, *supra* note 39, at 754. For example, he would "never plead the Statute of Limitations when based on the mere efflux of time. . . ." *Id.*

195. Sharswood, *supra* note 3, at 99-103.

196. *Id.* at 72, 99. To do otherwise would immorally sell the client "not only [the lawyer's] skill and learning, but [the lawyer] himself." *Id.* at 101 (quoting Whewell's *Elements of Moral and Political Science*). For example, if a client had confessed to a lawyer and the lawyer believed the confession, the lawyer must represent the client zealously by raising doubts about the adequacy of the government's proof but could not ethically suggest that another had committed the crime. Sharswood illustrated this point with Charles Phillips's defense of Courvoisier for the murder of Lord William Russell. After Phillips had suggested at the beginning of the trial that others might be guilty of the crime, Courvoisier confessed to him. Phillips contemplated withdrawal. After consulting with the court, he continued in the case and argued that the case against his client had not been proven. However, Phillips no longer suggested guilt on the part of other parties because that might have brought "down an unjust suspicion upon an innocent person" or resulted in his "falsely pretend[ing] a confidence in the truth and justice of his cause, which he did not feel." *Id.* at 103-05.

197. *Id.* at 118-19.

198. *Id.* at 98-99.

199. *Id.* at 112. For example, with regard to "stay and exemption laws," Sharswood noted that "[i]t is not every case in which a man has a *legal* that he has a *moral* right to claim the benefit of such laws." *Id.* at 113. Sharswood urged that a lawyer should refuse to assist a debtor with "ample means to pay" who seeks to harass the creditor or who "wishes to take advantage of hard times to make more than legal interest, or with concealed means unknown to the execution plaintiff, claims the exemption. . . ." *Id.*

Sharswood further relied on the "Sermon on the Mount" in advising: "[C]onfine not yourself in your transactions with your fellow-men to giving them simply the strict measure of their legal rights, give them all that is honestly theirs as far as you have ability, whether the law affords them a remedy or not." *Id.* at 114.

200. *Id.* at 109. Sharswood asserted that "[a] very important part of the advocate's duty is to moder-

## B. THE CANONS OF ETHICS

The *Canons* drew on Sharswood's republican vision for both form and content. The very need for a formal code of ethics, however, represented a retreat from Sharswood's faith in the virtue of lawyers and the legal community.

1. Content of the *Canons*

The drafters of the *Canons* espoused a progressive vision of lawyers as disinterested policy makers similar to Sharswood's republican perspective.<sup>201</sup> They sought to use the *Canons* to reverse what they perceived as the decline of law from its professional role to the status of a business.<sup>202</sup> The drafters liberally borrowed text and ideas from Sharswood's essay<sup>203</sup> which offered a way to achieve the republican objective while still accommodating the lawyer's adversarial role.

Sharswood's republican perspective is present in the first words of the *Canons*. The "Preamble" to the *Canons* describes how the administration of justice, government of the United States, and indeed "[t]he future of the Republic" depend upon the legal profession's "maintenance of Justice pure and unsullied" through members whose "conduct and motives . . . merit

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ate the passions of the party, and, where the case is of a character to justify it, to encourage an amicable compromise of the controversy." *Id.*

201.

[H]igh-minded lawyers were embarked on a practical program of reform. As leaders of the bar, they belonged to a radiation, communicated through endless reiteration in formal speeches, of patrician Whig aspirations to play a distinctive role in American society as a Third Force in politics (in fact the role of "the few" in classical republican theory), mediating between capital and labor, between private acquisitiveness and democratic redistributive follies; thus, they kept looking for social stages on which to enact the role of Tocqueville's lawyer-aristocrats.

Robert W. Gordon, "*The Ideal and the Actual in the Law*": *Fantasies and Practices of New York City Lawyers, 1870-1910*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 51, 56 (Gerald W. Gawalt ed., 1984) [hereinafter Gordon, *The Ideal*]; see also Gordon, *Independence*, *supra* note 81, at 16-17 (explaining how the promotion of professional independence and legal ethics would result in "trained disinterested professionals").

202. SEE Auerbach, *supra* note 38, at 34-35, 40-52; Gordon, *The Ideal*, *supra* note 201, at 61-62. The stock manipulation scandals of the late nineteenth century, which often included allegations of bribery of judges and jurors, sullied the reputation of even the bar's elite. Gordon, *supra* note 201, at 56-57. Many inside the profession feared it was devolving into uncritical service of business interests. AUERBACH, *supra* note 38, at 34-35, 40-41; Gordon, *supra* note 201, at 61; Louis D. Brandeis, *The Opportunity in the Law*, 39 AM. L. REV. 555, 558-59 (1905). At the same time, the number of personal injury and immigrant lawyers, who the elite viewed with distaste, was increasing. AUERBACH, *supra* note 38, at 40-53, 62-64; JULIUS HENRY COHEN, *THE LAW: BUSINESS OR PROFESSION?* 181-83 (rev. ed. 1924).

203. See discussion *supra* Part II.A.

the approval of all just men.”<sup>204</sup>

Similar republican language pervades the *Canons*. Canon 32, entitled “The Lawyer’s Duty in Its Last Analysis,” sets forth the counter-majoritarian obligation of loyalty to the law and the judicial system despite the contrary urging of any “client, corporate or individual, however powerful, nor any cause, civil or political, however important. . . .”<sup>205</sup> The lawyer “will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.”<sup>206</sup>

In delineating specific ethical obligations, the *Canons* place the highest priority on the lawyer’s duties to the legal system. Standards similar to Sharswood’s include prohibition of *ex parte* contacts with the court,<sup>207</sup> public support for the judiciary against “unjust criticism and clamor,”<sup>208</sup> candor and fairness in presentation of evidence and arguments to judge and jury,<sup>209</sup> and provision of counsel to the indigent prisoner.<sup>210</sup>

Even the *Canons* not directly drawn from Sharswood’s essay implement duties to the legal system. These include *Canons* establishing a duty to pursue merit selection of judges<sup>211</sup> and to refrain from trying cases in the press<sup>212</sup>, as well as an obligation to expose unethical behavior before proper tribunals.<sup>213</sup> Another *Canon* established duties of fair treatment of unrepresented parties and of refraining from communicating directly with parties represented by counsel.<sup>214</sup>

Obligations to fellow lawyers are added to these duties to the legal system. Like Sharswood, the *Canons* require lawyers to provide candor in communicating with the court and their colleagues,<sup>215</sup> to refrain from “taking technical advantage of opposite counsel,”<sup>216</sup> and to grant “liberally” requests for extensions and other technical requests, despite client instructions to the contrary.<sup>217</sup>

Similarly, in governing the lawyer-client relationship, the *Canons* employ Sharswood’s republican approach of limiting client advocacy. The *Canons*

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204. *CANONS*, *supra* note 7, at pmb1.

205. *Id.* at Canon 32.

206. *Id.*

207. *Id.* at Canon 3.

208. *Id.* at Canon 1.

209. *Id.* at Canons 22, 23.

210. *Id.* at Canon 4.

211. *Id.* at Canon 2.

212. *Id.* at Canon 20.

213. *Id.* at Canon 29.

214. *Id.* at Canon 9.

215. *Id.* at Canon 22.

216. *Id.* at Canon 25.

217. *Id.* at Canon 24.

address the question of "How Far a Lawyer May Go in Supporting a Client's Cause" and adopt Sharswood's instruction that "[t]he lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability. . . .'"<sup>218</sup> Like Sharswood, however, the *Canons* reject the notion that "it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause."<sup>219</sup>

In determining the proper balance, the *Canons* adopt, for the most part, Sharswood's approach. They urge that prosecutors should pursue justice and that a lawyer for a criminal defendant should "by all fair and honorable means . . . present every defense that the law of the land permits,"<sup>220</sup> language which appears to imply Sharswood's limiting principles.<sup>221</sup> The *Canons* further include his limiting principles prohibiting assertion of a lawyer's personal belief,<sup>222</sup> requiring fair treatment of witnesses and opponents,<sup>223</sup> and preventing clients from engaging in improprieties with regard to the court and the participants in the legal process.<sup>224</sup> The *Canons* thereby limit lawyers' obligation to the client within the bounds of law to avoid "any manner of fraud or chicane."<sup>225</sup> For civil litigation, the *Canons* go further than Sharswood by binding a lawyer for a defendant, as well as a plaintiff, from taking a case in order "to harass or to injure the opposite party or to work oppression or wrong."<sup>226</sup>

The *Canons* also make clear that, as in Sharswood's Essay,<sup>227</sup> the responsibility for determining the moral bounds of advocacy rests with the lawyer. Canon 31 expressly states that "[t]he responsibility for advising as to questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions."<sup>228</sup> Canon 15 similarly concludes that a lawyer "must obey his own conscience and not that of his client."<sup>229</sup>

Inside the bounds of advocacy, the *Canons* tend to follow, sometimes with more or less specificity, Sharswood's duties of loyalty, confidentiality,

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218. *Id.* at Canon 15 (quoting SHARSWOOD, *supra* note 3, at 78-79).

219. *Id.*

220. *Id.* at Canon 5.

221. See *supra* text accompanying notes 169-75.

222. CANONS, *supra* note 7, at Canon 15.

223. *Id.* at Canon 18.

224. *Id.* at Canon 16.

225. *Id.* at Canon 15.

226. *Id.* at Canon 30.

227. See *supra* text accompanying notes 169-82.

228. CANONS, *supra* note 7, at Canon 31.

229. *Id.* at Canon 15.

and competence. In terms of loyalty, similar to Sharswood's essay,<sup>230</sup> Canon 6 prohibits both concurrent and subsequent conflicts.<sup>231</sup> Like Sharswood's instruction not to do business with a client,<sup>232</sup> Canon 10 forbids a lawyer from "acquiring [an] interest in litigation."<sup>233</sup> Canon 11, following Sharswood's more general warning about protecting client assets,<sup>234</sup> forbids a lawyer from commingling client assets.<sup>235</sup> Canon 8 adopts Sharswood's requirement of candor to the client.<sup>236</sup>

The duties of confidentiality and competence, while acknowledged, are less developed in the *Canons*. Of Sharswood's competence duties,<sup>237</sup> the *Canons* import only the obligations of punctuality<sup>238</sup> and thorough preparation before offering legal advice.<sup>239</sup> Sharswood's exhortations of confidentiality<sup>240</sup> do not appear as a separate *Canon*. Confidentiality is, however, mentioned in the *Canon* barring successor conflicts,<sup>241</sup> and does appear as the basis for a separate *Canon* added in 1928.<sup>242</sup>

With regard to compensation, the *Canons* retain Sharswood's perspective<sup>243</sup> but are less restrictive. While disfavoring suits against clients, the *Canons* permit such suits.<sup>244</sup> Similarly, the *Canons* allow contingent fee agreements but urge strict court scrutiny.<sup>245</sup>

On balance, therefore, the *Canons* largely adopt Sharswood's ethical standards, including his republican vision of the lawyer's role. Indeed, the *Canons* continue, in part, Sharswood's republican confidence in the virtue of the legal community by relying largely on general discretionary standards, rather than employing detailed instructions for ethical conduct.

## 2. Enforcement of the *Canons*

The enactment of the *Canons* constituted in part a rejection of Shar-

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230. See *supra* text accompanying notes 184-90.

231. CANONS, *supra* note 7, at Canon 6.

232. See *supra* text accompanying note 187.

233. CANONS, *supra* note 7, at Canon 10.

234. See *supra* text accompanying note 188.

235. CANONS, *supra* note 7, at Canon 11.

236. *Id.* at Canon 8; see *supra* text accompanying notes 189-90.

237. See *supra* text accompanying notes 194-98.

238. CANONS, *supra* note 7, at Canon 21.

239. *Id.* at Canon 8.

240. See *supra* text accompanying notes 191-93.

241. CANONS, *supra* note 7, at Canon 6.

242. *Id.* at Canon 37.

243. See discussion *supra* pages 30-33.

244. Suits against clients are permitted only in circumstances to "prevent injustice, imposition, or fraud." CANONS, *supra* note 7, at Canon 14; see *supra* note 24.

245. Where sanctioned by law, contingent fee arrangements should be scrutinized to protect clients from "unjust charges." CANONS, *supra* note 7, at Canon 13; see *supra* note 24.

swood's view that an essay on ethical standards, reinforced by the legal community and the market, would suffice to obtain compliance with high ethical standards. Indeed, the experience of increased commercialization and scandal in the bar since the publication of Sharswood's essay<sup>246</sup> indicated the limited success of his approach. Moreover, the growth in size and diversity of both the lawyer and client populations reduced the likelihood that adversaries or clients would be repeat players as Sharswood's model had assumed.<sup>247</sup>

Much in the same way that modified republicans located virtue in a professional elite in response to loss of faith in the virtue of the populace,<sup>248</sup> the *Canons* located responsibility for ethical standards in the legal elite in response to a loss of faith in the larger legal community.<sup>249</sup> Professor Auerbach suggests that the *Canons* were part of an effort of prominent lawyers to "use[] bar associations as a lever of control over professional ethics, educational qualifications, and bar admissions."<sup>250</sup> The *Canons* were both a reaffirmation of high ethical standards and a code against which to measure the ethics of individual practitioners.<sup>251</sup> The elite could use the *Canons* to educate lawyers, to censure unethical conduct, and to seek judicial and legislative action to penalize unethical acts.<sup>252</sup>

In the last analysis, however, the *Canons* were "fraternal norms" with "no direct legal effect either in grievance proceedings against lawyer misconduct or in civil actions for legal malpractice."<sup>253</sup> The *Canons* did, however, serve courts as "guides to the ethical duties of lawyers"<sup>254</sup> as part of a developing "common law governing legal practice."<sup>255</sup>

While generally retreating from Sharswood's conception of self-enforcing

246. See *supra* note 216.

247. Professor Auerbach has suggested that Sharswood's "[e]mphasis on reputation as the key to professional dignity and success . . . presupposed the vanished homogenous community whose lawyers were known, visible, and accessible. . . . In twentieth-century cities, ironically, these conditions flourished only in the subculture inhabited by corporate law firms and their business clients." AUERBACH, *supra* note 38, at 42.

248. See *supra* text accompanying notes 72-77.

249. Specifically, elite members of the bar utilized standards of ethical conduct to condemn contingent fee arrangements and ambulance chasing practices. AUERBACH, *supra* note 38, at 40-53.

250. *Id.* at 64. Moreover, Professor Auerbach notes that "[t]he ethical crusade that produced the *Canons* concealed class and ethnic hostility," particularly against Jewish and Catholic lawyers of lower-class origin, and served to stratify the profession. *Id.* at 50-51.

251. Two other developments increased the bar leadership's control of the profession. These were "first, creation of the 'integrated bar,' a state-sponsored professional association under the aegis of the courts to which all practicing lawyers were required to maintain membership[, and] second, intensified disciplinary enforcement, including the sanctions of disbarment and suspension, which only the courts could impose." Hazard, *supra* note 32, at 1250-51.

252. AUERBACH, *supra* note 38, at 44-52, 60-65; COHEN, *supra* note 202, at 155-56.

253. Hazard, *supra* note 34, at 1249-50.

254. *Id.* at 1254 n.77.

255. *Id.* at 1255 n.79.

ethical standards,<sup>256</sup> the *Canons* did not reject them entirely. A republican faith in the basic virtue of lawyers and the legal community made unnecessary either binding rules or detailed consumer protection regulations. Indeed, Canon 27, which unlike Sharswood's essay, prohibits advertising,<sup>257</sup> echoes Sharswood's perspective on the value of ethical behavior. In its original form, Canon 27 states that "[t]he most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust."<sup>258</sup>

This language gives even greater weight than Sharswood's model to the superior wisdom of republican lawyer experts in evaluating other lawyers. Sharswood at least acknowledged that wealthy clients, who share high values, will make choices based on reputation in the bar.<sup>259</sup> In the *Canons*, the client market, although implied, has no visible role in enforcement.

### C. SURVIVAL OF SHARSWOOD'S REPUBLICAN VISION IN THE MODEL CODE AND THE MODEL RULES

The *Model Code* and the *Model Rules* move further away from the notion that the legal community and market will enforce high ethical standards in the normal course of business. The *Model Code*, adopted in 1970, introduces for the first time legally binding Disciplinary Rules in addition to aspirational Ethical Considerations.<sup>260</sup> The *Model Rules*, adopted in 1983, discard the Ethical Considerations for a format including only legally binding standards.<sup>261</sup>

But while they repudiate the notion of self-enforcing standards, the *Model Code* and the *Model Rules* do include many elements of a republican vision. Both describe the legal profession as a governing class, independent of outside control, with a counter-majoritarian duty to protect the rule of law and to promote the impartial administration of justice.<sup>262</sup> Both pre-

256. See discussion *supra* Part IV.B.1.

257. *CANONS*, *supra* note 7, at Canon 27.

258. *Id.*

259. See *supra* text accompanying notes 210-12.

260. Hazard, *supra* note 34, at 1251, 1254.

261. *Id.* at 1254.

262. The *Model Rules*, for example, describe lawyers as a self-governing profession with an obligation to "seek improvement of the law [and] the administration of justice. . . ." MODEL RULES pmb1. The *Model Rules* further instruct that "[a] lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty when necessary to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process." *Id.* The *Model Rules* also forbid lawyers from making false or reckless statements regarding judges and urge lawyers "to continue traditional efforts to defend judges and courts unjustly criticized." MODEL RULES Rule 8.2(a) & cmt. See also MODEL RULES Rule 3.5 (prohibiting a lawyer from engaging in improper influence upon a tribunal). But see Hazard, *supra* note 34, at 1264-65 (suggesting that



scribe republican duties of candor to the court<sup>263</sup> and of courtesy and fairness to fellow lawyers and to non-clients.<sup>264</sup>

Both the *Model Code* and the *Model Rules* also pose a republican solution to Sharswood's question "what are the limits of [the lawyer's] duty when the legal demands or interests of his client conflict with [the lawyer's] own sense of what is just and right?"<sup>265</sup> The answer lies not with the client but with the discretion and superior judgment of the lawyer or legal profession. First, the lawyer need not take the case.<sup>266</sup> Second, if the lawyer takes the case, the ethics codifications only require the lawyer to follow client instructions regarding the decision to settle in a civil case and the decisions whether to plead, waive a jury, or testify in a criminal case.<sup>267</sup> Hortatory language regarding deferring to client decisions on process questions with non-legal implications is offset by language leaving the final determination to the lawyer or the standards of the legal profession.<sup>268</sup> Third,

*Model Rules* have moved away from Canon's message that lawyers must support and sustain the courts).

The *Model Code* similarly states that "[l]awyers, as guardians of the law, play a vital role in the preservation of society," including "the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government." MODEL CODE pmbl. The specific provisions of the *Model Code* also mandate duties to the integrity of the legal system and respect for the courts and the rule of law. See, e.g., MODEL CODE Canon 1 ("A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession"); EC 7-1 (prescribing the duty of a lawyer to represent his client zealously within the bounds of the law where the duty is derived from his membership in a profession having the duty to assist the public); Canon 8 ("A Lawyer Should Assist in Improving the Legal System").

263. MODEL RULES Rule 3.3; MODEL CODE DR 7-102.

264. MODEL RULES Rules 3.4, 4.1-4.4; MODEL CODE DR 7-101(A)(1), DR 7-102(A), DR 7-104(A), DR 7-106(C), DR 7-109.

265. SHARSWOOD, *supra* note 3, at 81.

266. Professor Wolfram has noted that "[t]he lawyer codes in this century have consistently taken the position that, with two exceptions—unpopular clients in need of legal services and court appointments—every lawyer is free to accept or reject any client for reasons personal to the lawyer. WOLFRAM, *supra* note 39, § 10.2.2, at 573. See MODEL RULES Rule 6.2 & cmt. (stating that a lawyer need not accept a client or cause she regards as "repugnant"); MODEL CODE EC 2-26 (urging that a lawyer should not "lightly decline proffered employment" where the objective is to "make legal services fully available").

The suggestion that lawyers make themselves available to unpopular clients, however, is only hortatory rather than mandatory. MODEL RULES Rule 1.2 cmt.; MODEL RULES Rule 6.2 cmt.; MODEL CODE EC 2-26. Moreover, the provisions regarding court appointment allow exceptions for "compelling reasons" (MODEL CODE EC 2-29), or for "good cause" (MODEL RULES Rule 6.2 cmt.).

267. MODEL RULES Rule 1.2(a). Generally, the provisions of the Code are less clear. *Model Code* DR 7-101 speaks of the client's "lawful objectives," and the hortatory language of EC 7-7 describes the client's authority to decide in a civil case whether to "accept a settlement offer or . . . waive [the] right to plead an affirmative defense," and in a criminal case on whether to plead guilty or to appeal. The Code does not, however, expressly provide the client with authority over a broad range of decisions. WOLFRAM, *supra* note 39, § 4.3, at 157.

268. MODEL RULES Rule 1.2 cmt. (establishing "distinction between objectives and means," but acknowledging difficulty of even making such distinction and noting "a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so"); MODEL CODE

the legal ethics codes urge the lawyer to counsel the client on the moral as well as legal implications of the representation.<sup>269</sup> Fourth, except where irreparable prejudice will result, a lawyer may generally withdraw from representing a client who seeks a strategy or goal repugnant to the lawyer.<sup>270</sup> In sum, despite language suggesting that the adversarial commitment is primary, lawyers have broad freedom under the codes to exercise discretion in client representation.

The form of the binding provisions of the *Model Rules* and the *Model Code* is also consistent with Sharswood's republican faith in lawyers. The use of relatively general statements of ethics enforced by the legal profession evidences a continued faith in the basic virtue of lawyers and the legal

DR 7-101(B)(1)("[A] lawyer may . . . [w]here permissible, exercise his professional judgment to waive or fail to assert a right or position of his client."); MODEL CODE EC 7-7 ("In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is entirely that of the client . . ."); MODEL CODE EC 7-8 ("In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself.")

The strong language of these Ethical Considerations is, of course, only hortatory. Even the requirement of *Model Code* DR 7-101(A)(1) that "[a] lawyer shall not intentionally . . . [f]ail to seek the lawful objectives of his clients through reasonably available means" is in the final analysis subject to a determination by the lawyer or the legal profession of what means are "reasonably" available. See Susan R. Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307, 321-33 (1980) (arguing that use of reasonable skill standard in informed consent case against attorney "leaves the client at the mercy of the legal profession"); JAY KATZ, *THE SILENT WORLD OF DOCTOR AND PATIENT* 48-85 (1984) (noting that use of reasonable doctor standard in informed consent cases undermines patient self-determination). Moreover, a footnote to the phrase "reasonably available means" expressly refers, *inter alia*, to Canon 15 of the *Canons*, which provides that the lawyer "must obey his own conscience and not that of his client." MODEL CODE DR 7-101(A)(1) n.67 (citing Canon 5).

269. MODEL RULES Rule 1.2 cmt.; MODEL RULES Rule 2.1 cmt.; MODEL CODE EC 7-8. See WOLFRAM, *supra* note 39, § 4.3, at 157-59.

270. Under *Model Rule* 1.16(b), without the client's permission, a lawyer may withdraw for any reason "if the withdrawal can be accomplished without material adverse effect on the interests of the client. . . ." Even with such a "material adverse effect," a lawyer may withdraw if "a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent" or "other good cause for withdrawal exists." MODEL RULES Rule 1.16(b)(3), 1.16(b)(6). Under *Model Code* DR 2-110(C)(1)(e), without the client's permission, a lawyer may withdraw if the client "[i]nsists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer. . . ." In a matter pending before a tribunal, a lawyer may withdraw if the lawyer "believes in good faith . . . that the tribunal will find the existence of other good cause for withdrawal" or if the client "[b]y other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively." MODEL CODE DR 2-110(C)(1)(6), 110(C)(1)(d). Generally, if the matter is pending before a tribunal, withdrawal is conditioned upon the tribunal's approval. MODEL RULES Rule 1.16(c); MODEL CODE DR 2-110(A)(1). A court is likely to grant withdrawal in a criminal case unless the effect of such withdrawal "would be to require a continuance that would seriously disrupt the progress of the case or if prior continuances have already been granted." WOLFRAM, *supra* note 39, § 9.5.1, at 544 (footnote listing cases omitted). The same standards are applied in civil cases, "although with less strictness." *Id.* § 9.5.1, at 545 (footnote listing cases omitted). See, e.g., *Fisher v. State*, 248 So.2d 479, 486 (Fla. 1971) (withdrawal motions "should rarely be denied").

profession. Rather than prescribe specific protections of consumer rights<sup>271</sup> or limit the independence of the profession, the modern ethics codes reduce legal ethics to binding rules through minimum standards for ethical conduct<sup>272</sup> that shrink the scope of areas governed by ethics from that proposed by Sharswood.<sup>273</sup> The choice to narrow the area of conduct subject to legal ethics codification has broadened the area subject to lawyer discretion.

Another republican influence is the continuing ambivalence toward commercial behavior. For example, advertising was prohibited until courts voided limits on advertising on constitutional grounds.<sup>274</sup> While the *Model Code* and the *Model Rules* continue Sharswood's skepticism of commercial behavior, they also reject even his qualified faith in the market.<sup>275</sup> The *Model Code* and the *Model Rules* do not suggest that high ethical standards will lead to financial reward. Indeed, the *Model Code* expressly notes that the small market of repeat players, which Sharswood's model assumed, does not reflect the reality of modern practice.<sup>276</sup>

Accordingly, although the *Model Code* and *Model Rules* retreat from Sharswood's faith in the self-policing nature of ethical standards, they con-

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271. The ABA, for example, rejected the mild suggestion that the *Model Rules* require that contracts for legal services be in writing. See STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS 25-29 (1989) (comparing draft rules requiring written fee agreements with *Model Rules* Rule 1.5 as adopted which prefers, but does not require, a written agreement). Moreover, rules that relate to protecting clients, such as those mandating competence, are quite general and do not specify minimum standards of acceptable lawyer conduct. See MODEL RULES Rule 1.1 (defining "competent representation" as "legal knowledge, skill, thoroughness and preparation reasonably necessary" for representation); MODEL CODE DR 6-101(A) (defining failure to act competently as handling a legal matter which the lawyer "knows or should know that he is not competent to handle" or "without preparation").

272. MODEL RULES Scope (noting that the *Model Rules* "do not . . . exhaust the moral and ethical considerations that should inform a lawyer"); MODEL CODE Preliminary Statement (observing that Disciplinary Rules have narrower scope than aspirations of Ethical Considerations).

273. Sharswood, for example, provides guidelines for the exercise of conscience, see discussion *supra* Parts III.B, IV.A, while the *Model Code* and *Model Rules* do not.

274. 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING §§ 7.1:101-103, at 856-60 (2d ed. 1990) (recounting history of ABA's restrictions on lawyer advertising and subsequently struck down by the Supreme Court).

275. See *supra* Part IV.C.

276. *Model Code* EC 2-6 notes: "Formerly a potential client usually knew the reputations of local lawyers for competency and integrity. . . ." Similarly, *Model Code* EC 2-7 observes:

Changed conditions . . . have seriously restricted the effectiveness of the traditional selection process. Often the reputations of lawyers are not sufficiently known to enable laypersons to make intelligent choices. The law has become increasingly complex and specialized. Few lawyers are willing and competent to deal with every kind of legal matter, and many laypersons have difficulty in determining the competence of lawyers to render different types of legal services. . . . Lack of information about the availability of lawyers, the qualifications of particular lawyers, and the expense of legal representation leads laypersons to avoid seeking legal advice.

tinue to include aspects of his republican vision of legal ethics.

## V. THE IMPLICATIONS OF REDISCOVERING SHARSWOOD'S REPUBLICAN VISION

This Section examines the changes in the terrain of legal ethics scholarship resulting from the rediscovery of Sharswood's republican vision. It explores how contemporary commentators have misread the legal ethics codes and places Sharswood's contributions in the context of the modern debate regarding the lawyer's role.

### A. MISINTERPRETING SHARSWOOD AND THE LEGAL ETHICS CODES

As demonstrated above, the historical starting point for an exploration of the legal ethics codes is Sharswood's republican vision. Although Sharswood's vision continues to influence the text of the contemporary ethical codes, most commentators view legal ethics as having its origins in the lawyer's obligations to the client, with the object being maximization of the client's goals within the limits of the law. Why have these commentators failed to recognize the republican basis of our legal ethics codes and its textual vestiges? Two factors appear to have contributed to the modern misreading of the ethical codes. First, current commentators have failed to examine thoroughly Sharswood's theoretical vision and its contribution to the codes. Second, an adversarial reading of discretionary codes permits lawyers publicly to proclaim their lack of moral accountability as advocates while privately exercising broad control of client choices.

Most modern commentators, whether they favor or criticize the adversary ethic, view it as the "dominant ethic . . . embedded in our professional codes."<sup>277</sup> They describe "the standard conception of the lawyer's role [as] consisting of (1) a role obligation (the 'principle of partisanship') that identifies professionalism with extreme partisan zeal on behalf of the client and (2) the 'principle of nonaccountability,' which insists that the lawyer bears no moral responsibility for the client's goals or the means used to attain them."<sup>278</sup>

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277. Thomas Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697, 697 (1988). See also FREEDMAN, *supra* note 34, at 65 (noting that the "ethic of zeal" is the "dominant standard of lawyerly excellence"); 1 HAZARD & HODES, *supra* note 274, §1.2:102, at 24 (arguing that lawyers serve society best by zealously serving their clients); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 594 (1985) (positing that the adversary ethic is essential to a "well-ordered legal system"). But see Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1569 (suggesting that contrary to the standard conception, "legal ethics has no paradigm, only some fragmentary conceptions of the lawyer's role vying inconclusively for dominance") (footnote omitted).

278. LUBAN, *supra* note 38, at xx.

Commentators suggest that this "standard conception—the principles of partisanship and nonaccountability—accurately represents leading themes in the official rules of the American legal profession."<sup>279</sup> In the view of these commentators, the ethical codifications embody the notion that "[l]awyers exist . . . to vindicate the right of 'each member of our society . . . to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense.'"<sup>280</sup> These commentators generally trace the historical roots of legal ethics to Lord Henry Brougham's famous "credo" that "[a]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client."<sup>281</sup>

Modern commentators do not entirely ignore the republican aspects of the legal ethics codes. They acknowledge, for example, the lawyer's duty as a public officer of candor to the court.<sup>282</sup> Their general view of these duties, though, is that "when lawyers start talking this way about their public duties, being officers of the court and so on, most of us understand that we have left ordinary life far behind for the hazy aspirational world of the Law Day sermon and Bar Association after-dinner speech—inspirational, boozily solemn, anything but real."<sup>283</sup>

As demonstrated in this article, however, these republican aspects are central to the legal ethics codes. The roots of the codifications of legal ethics are found in the concepts and language in Sharswood's essay that expressly reject Brougham's "credo" as the basis for ethical standards.<sup>284</sup> Instead, Sharswood articulates a republican vision of lawyers as a governing class, the duties of which include advocacy. While important, advocacy remains secondary to the lawyer's public duties, and must give way when it conflicts with these duties.<sup>285</sup> The legal ethics codes generally adopt Sharswood's perspective by continuing to describe lawyers as public officers and to provide them with broad discretion as independent moral actors.<sup>286</sup>

One reason modern commentators have misread the basis for ethical codes is their inattention to Sharswood's role.<sup>287</sup> As discussed earlier, Shar-

279. *Id.* at 393.

280. Stephen Ellman, *Lawyers and Clients*, 34 U.C.L.A. L. REV. 717 (1987) (quoting *Model Code EC 7-1*).

281. LUBAN, *supra* note 38, at 54.

282. See, e.g., William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1084-1090.

283. Gordon, *Independence*, *supra* note 81, at 13.

284. See *supra* text accompanying notes 94-107.

285. See *supra* Part IV.A.

286. See *supra* Part IV.

287. In contrast, as recently as the 1950s, commentators were sensitive to Sharswood's importance. Henry Drinker, probably the leading ethics expert of that time, wrote that "[m]ost lawyers know of Judge George Sharswood's *Professional Ethics*; many have read it. Very few, however, have read or

swood has largely disappeared from modern commentary. His work is considered in a cursory way that makes little attempt to analyze his theoretical perspective and its continuing influence.<sup>288</sup> Even those few commentators who have addressed his theoretical perspective have failed to recognize the dual republican and adversarial character of his approach.<sup>289</sup> The dearth of analysis of Sharswood's essay may well have resulted from a disinclination to question the perceived wisdom that the adversarial ethic is the historical basis of legal ethics.

In some sense, this neglect of the republican origins of the ethics codes may have served the interests of the bar. The established wisdom permits lawyers to have the best of both worlds. The adversarial ethic allows them to disclaim to the public any moral responsibility for their actions.<sup>290</sup> At the same time, retention of a republican vision in the codes permit them to exercise broad discretion to refuse client instructions, whether that discretion is based on expertise, morality or self-interest.<sup>291</sup> In effect, lawyers have most of the power and none of the responsibility. But maybe this paradox has not fully escaped the public. Perhaps the continuing low esteem of the profession results, in part, from a sense that lawyers are pulling a fast one.

#### B. THE IMPLICATIONS OF SHARSWOOD'S REDISCOVERY FOR THE DEBATE ABOUT THE LAWYER'S PROPER ROLE

This section explores the implications of placing the ethics codes in their historical context for critics and defenders of the adversarial model of legal ethics. The Section, however, does not take a normative position on Sharswood's republican vision or attempt to identify which of the current approaches best exemplifies the republican perspective.

To critics, Sharswood's vision offers a historical precedent. While some critics of the adversarial system have identified a republican tradition of lawyering, they have not recognized that tradition's important role in the

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even know of any other book on the subject." DRINKER, *supra* note 7, at ix. Drinker described his goal in writing his now classic treatise on legal ethics as providing "a modern book on the subject which would apply the eternal principles [stated by Sharswood] to present conditions. . . ." *Id.*

288. See *supra* Part III.B.

289. See *id.*

290. See *supra* text accompanying notes 290-94.

291. See *supra* Parts IV.B, IV.C. Indeed, a number of empirical studies have suggested that many lawyers manipulate clients to achieve the lawyers' financial and professional interests. *E.g.*, DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974); Gary Neustadter, *When Lawyer and Client Meet: Observations of Interviewing and Counseling Behavior in the Consumer Bankruptcy Law Office*, 35 *BUFF. L. REV.* 177 (1986); Abraham S. Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 *LAW & SOC'Y REV.* 15, 22-31 (1967).

development of the legal ethics codes.<sup>292</sup> Locating the republican vision in the essay which is the basic source of our legal ethics codes offers strong historical grounding for the critics' perspective.

In addition, the rediscovery of Sharswood poses challenges for critics of the adversary system. First, it requires them to confront the normative implications of a non-adversarial ethic. Modern theorists, like Sharswood before them, vest the lawyer with independent moral responsibility. For example, Professor David Luban advises lawyers to be "moral activists,"<sup>293</sup> and Professor William Simon recommends that lawyers choose the course of action "most likely to promote justice."<sup>294</sup>

While Sharswood and the modern theorists would agree that at a minimum independent moral responsibility carries a duty to the rule of law, they would be likely to disagree as to how to construe the full extent of that responsibility. Sharswood, for example, works from a political theory that places great value on protection of private property, including minimizing the intrusion by government into business affairs.<sup>295</sup> Luban and Simon, on the other hand, write in part from a concern that wealthy persons and organizations have disproportionate legal resources. They ask lawyers to limit their assistance to business interests and to pursue legal activism, including government intervention, to protect the disadvantaged.<sup>296</sup> Professor Robert Gordon suggests that these apparently contradictory perspectives can be reconciled by recognizing the "modern counterpart" to Sharswood's protection of "propertied minorities" from "levelling popular legislatures" as the protection of "'discrete and insular minorities' . . . from dangers from the majority."<sup>297</sup> Nevertheless, disparate perspectives on rule of law and the common good exist within the legal profession. Absent a consensus on governance goals, providing lawyers with moral discretion will not achieve the critics' goals of lawyering to promote their vision of justice.<sup>298</sup>

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292. Gordon, *Independence*, *supra* note 81, at 14-17. Particularly, Professor Gordon noted that "[t]he 'republican' vocabulary of civic 'virtue,' once employed to explain why lawyers should be at least somewhat independent of the major powers and factions of civil society, is rather out of fashion." *Id.* at 17 (footnote citing sources "reviving" the republican discourse omitted).

293. In calling for "moral activism" for lawyers, Professor Luban envisages a "law practice in which the lawyer who disagrees with the morality or justice of a client's ends does not simply terminate the relationship, but tries to influence the client for the better." LUBAN, *supra* note 38, at 160.

294. Simon, *supra* note 282, at 1090.

295. See *supra* Part III.B.

296. E.g., LUBAN, *supra* note 38, at 160-74, 293-316; Simon, *supra* note 282, at 1090-1119.

297. Letter dated August 12, 1992 from Professor Robert W. Gordon to the author at 2 (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938)).

298. Consensus may indeed exist in support of the less sweeping proposition that rule of law requires basic procedural ground rules. Cf. Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 258-61 (1990).

A second and related challenge arises from the generality of any vision of lawyering grounded in the lawyer's exercise of independent moral judgment. Sharswood's vision nonetheless offers useful assistance to practitioners because it satisfies two conditions. One, practitioners who share a high moral character and an understanding of what is moral will presumably exercise judgment in a similar way.<sup>299</sup> Two, Sharswood's standards are sufficiently detailed and grounded in a particular vision of the lawyer's role to suggest guidelines for when and how a lawyer should apply independent judgment.<sup>300</sup> Absent either of these conditions, non-adversarial theories which ask lawyers to promote justice will generally provide little guidance to practitioners seeking to resolve ethical dilemmas. In that event, they run the risk of degenerating into idealistic masks for confusion or hypocrisy.

The third challenge that the rediscovery of Sharswood poses for critics of the adversarial system is the realization that the spirit of the ethics codes which they attack is their own. Professor David Luban, for example, has recommended that "the rules be redrafted to allow lawyers to forego immoral tactics or the pursuit of unjust ends without withdrawing, even if their clients insist that they use tactics or pursue these ends."<sup>301</sup> A reading of the codes in light of Sharswood's contribution, however, reveals that to achieve Luban's goal they need not be redrafted. In the civil context, only the decision to settle must be the client's. All other decisions, whether weighted toward the client, fall within the lawyer's discretion.<sup>302</sup> Lawyers also need not accept cases they believe unjust.<sup>303</sup> That goes most of the way toward achieving Luban's goal of "allow[ing] lawyers to forego immoral tactics or the pursuit of unjust ends without withdrawing. . . ." When you permit withdrawal and consider its relatively liberal availability,<sup>304</sup> the lawyer can avoid following instructions of a client who makes an objectionable determination even of whether to settle, the only civil decision required to be in the client's discretion.

Ironically, even the anti-republican move from ethical guidelines to binding rules has resulted in broad scope for attorney discretion. The shift to rules could have been accompanied by more specific provisions to protect consumer interests and to instruct lawyers as to the details of competent, ethical lawyering. Instead, the republican faith in the virtue of lawyers resulted in a shift which only narrowed the focus of the stated norms for

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299. See *supra* Part IV.A.

300. See *supra* Parts III.B., IV.A.

301. LUBAN, *supra* note 38, at 159.

302. See *supra* note 281 and accompanying text.

303. See *supra* note 282 and accompanying text.

304. See *supra* note 270.



lawyer conduct to provide a minimum standard for ethical conduct,<sup>305</sup> leaving greater room for the individual lawyer's subjective exercise of conscience.

The realization that the codes permit a non-adversarial ethic leads to a fourth challenge to critics of the adversarial system. Most of them argue that lawyers' actions under the existing codes are often immoral.<sup>306</sup> Analysis of Sharswood's republican vision reminds us, however, that ethical schemes providing lawyers with broad discretion rely on an assumption that lawyers are capable of, and will tend toward, moral conduct.<sup>307</sup> Therefore, if, as the modern critics assert, lawyers who currently have discretion do not exercise it appropriately, the critics need to explain how lawyers could be made to act more virtuously in the future.

Sharswood's republican vision poses an equally powerful challenge to defenders of the adversarial ethic. Despite the consensus that the adversarial ethic is the foundation of legal ethics, the *Code* and the *Rules* do not require a lawyer to follow client instructions. Indeed, as discussed in Part IV, the vestiges of that vision in the content and language of the codes provide lawyers with broad discretion to reject or ignore clients' instructions. This textual analysis is consistent with the empirical evidence that, except for corporate practice,<sup>308</sup> lawyers tend to follow their own self-interest when it conflicts with the interests of their clients.<sup>309</sup> Accordingly, advocates of the adversarial ethic, rather than its critics, need to suggest major changes in the ethical codes.

A further challenge to defenders of the adversarial ethic is perhaps more symbolic than substantive. Analysis of survivals of Sharswood's republican vision reminds us that republican duties, such as candor to the court and conformity to law, expressly limit the obligation to the client of a lawyer who decides to follow client instructions. While most lawyers would probably concede these limitations, they apparently do not acknowledge that such limitations make Lord Brougham's credo that the lawyer "knows but one person in all the world, and that is his client" as inaccurate a description of the lawyer's ethical duties as the boast of Professor Gordon's hypothetical Law Day sermon about the bar's service to the common good.

## VI. CONCLUSION

An examination of the origin of the legal ethics codes in Judge George

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305. See *supra* Parts IV.B., IV.C.

306. E.g., LUBAN, *supra* note 38, at 148-58; Simon, *supra* note 292, at 1090-1119.

307. See *supra* Part IV.A.

308. See, e.g., Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 504-05 (1985).

309. See *supra* note 291.

Sharswood's essays supports a new reading of the legal ethics codes. Sharswood's ethical standards were derived from the lawyer's republican role as a public officer exercising independent moral discretion. He concluded that when republican duties conflicted with adversary duties to the client, the adversary duties must yield. Sharswood's essay was the basis for the *Canons* and its concepts and language survived in the *Code* and the *Rules*. Accordingly, although current commentators describe the codes as embodying the adversarial ethic, the codes in fact continue Sharswood's approach to the extent that they permit the lawyer discretion to reject or ignore client instructions.

This rediscovery of Sharswood and his contribution has implications for the recent debate regarding the lawyer's role. While providing critics of the adversarial ethic with historical grounding, it challenges them to clarify their strategies for achieving their goals, including explaining how to achieve consensus on normative objectives and elevate lawyer's moral standards. For proponents of the adversarial ethic, on the other hand, the challenge is to modify the codes to require lawyers to serve their clients.

Sharswood leaves us with one final challenge. By his republican approach to lawyer's ethics, he asserts in effect that legal ethics standards in large part define the nature of our society.<sup>310</sup> This claim is stunning, especially at a time when the reputation of lawyers is so low.<sup>311</sup> If, upon assessing Sharswood's assertion, we find that it has any merit, we will have to remake the field of legal ethics.

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310. See *supra* Part III.B.

311. See, e.g., Hazard, *supra* note 34, at 1239-40 (describing the seemingly chronic dissatisfaction of the public with lawyers).